This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

+ *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.

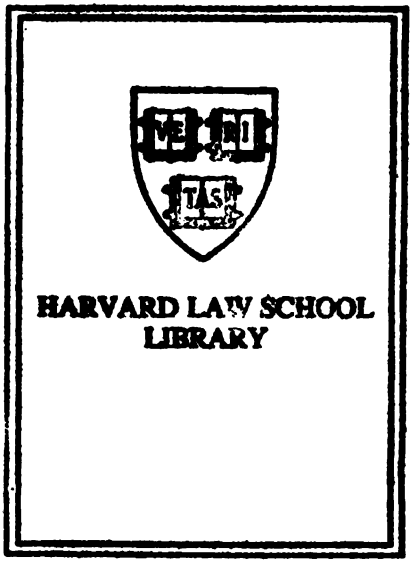
+ *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.

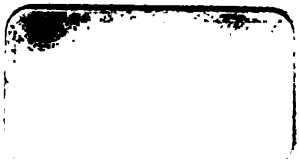
+ *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.

+ *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at `http://books.google.com/`





Digitized by Google

Digitized by Google

Digitized by Google

10K
c

REPORTS

OF

CIVIL AND CRIMINAL CASES

DECIDED BY THE

COURT OF APPEALS

OF KENTUCKY.

VOLUME XVII.

T. R. McBEATH, Reporter.

VOLUME 124 KENTUCKY REPORTS,

Containing Cases Decided from Nov. 21, 1906, to Mar. 16, 1907

LEXINGTON, KY.
JAMES E. HUGHES, PRINTER. AND BINDER
1908.

Digitized by Google

OCT 19 1908

Digitized by Google

JUDICIAL OFFICERS OF THE STATE

COURT OF APPEALS OF KENTUCKY

(As constituted during the period covered by this volume, 1906.)

HON. J. P. HOBSON, Chief Justice, During 1906.
ED C. O'REAR, Chief Justice, During 1907.

ASSOCIATE JUSTICES.

Hon. ED. C. O'REAR,
Hon. T. J. NUNN,
Hon. HENRY S. BARKER,
Hon. W. E. SETTLE,
Hon. JAMES E. CANTRILL,
Hon. JOHN M. LASSING,
Hon. JOHN D. CARROLL, Commissioner.

(As constituted now, 1908.)

Hon. ED. C. O'REAR, Chief Justice.

ASSOCIATE JUSTICES.

Hon. T. J. NUNN,
Hon. HENRY S. BARKER,
Hon. W. E. SETTLE,
Hon. J. P. HOBSON,
Hon. JOHN M. LASSING,
Hon. JOHN D. CARROLL,
Hon. WM. ROGERS CLAY, Commissioner.

OFFICERS OF THE COURT, 1908.

JAS. BREATHITT, Attorney General.
NAPIER ADAMS, Clerk.
C. S. WILSON, Deputy.
MISS DELLA ADAMS, Deputy.
W. B. O'CONNELL, Acting Deputy.
JAS. J. SMITH, Sergeant-at-Arms.
WINLOCK CHEEK, Asst. Sergeant-at-Arms.
CLAUDE HAZELRIGG, Tipstaff.
R. S. HOPKINS, Janitor.
FRANK K. KAVANAUGH, Librarian.
MISS SARA W. MAHAN, Asst. Librarian.
T. R. McBEATH, Reporter.

Digitized by Google

JUDGES OF CIRCUIT COURTS

Who presided during the period covered by this volume, 1906.

1st District—R. J. BUGG ..... Bardwall
2nd District—W. M. REED ..... Paducah
3rd District—THOS. P. COOK ..... Murray
4th District—J. F. GORDON ..... Madisonville
5th District—J. W. HENSON ..... Dixon
6th District—T. F. BIRKHEAD ..... Owensboro
7th District—W. P. SANDIDGE ..... Russellville
8th District—JOHN M. GALLOWAY ..... Bowling Green
9th District—WEED S. CHELF ..... Elizabethtown
10th District—SAMUEL E. JONES ..... Glasgow
11th District—I. H. THURMAN ..... Springfield
12th District—R. F. PEAK ..... Shelbyville
13th District—W. C. BELL ..... Harrodsburg
14th District—R. L. STOUT ..... Versailles
15th District—JOHN M. LASSING ..... Burlington
16th District—W. McD. SHAW ..... Covington
17th District—A. S. BERRY ..... Newport
18th District—L. P. FRYER ..... Falmouth
19th District—JAMES P. HARBESON ..... Flemingsburg
20th District—S. G. KINNER ..... Catlettsburg
21st District—ALLIE W. YOUNG ..... Mt. Sterling
22nd District—WATTS PARKER ..... Lexington
23rd District—ROBT. RIDDELL ..... Irvine
24th District—A. J. KIRK ..... Inez
25th District—J. M. BENTON ..... Winchester
26th District—M. J. MOSS ..... Pineville
27th District—H. C. FAULKNER ..... Barbourville
28th District—M. L. JARVIS ..... Albany
29th District—H. C. BAKER ..... Columbia
30th District—Jefferson Circuit Court—Louisville—
JOSEPH PRYOR, Criminal Branch.
SHACKELFORD MILLER, Chancery Branch, 1st. Div.
SAMUEL B. KIRBY, Chancery Branch, 2nd. Div.
EMMET FIELD, Common Pleas Branch, 1st Div.
THOMAS R. GORDON, Common Pleas Branch, 2nd Div.
MATT O'DOHERTY, Common Pleas Branch, 3rd Div.
31st District—D. W. GARDNER ..... Slayersville

Digitized by Google

COMMONWEALTH ATTORNEYS

During the period covered by this volume.

---

1 st District—W. H. HESTER .....Mayfield
2nd District—JNO. G. LOVETT .....Benton
3rd District—DENNY P. SMITH .....Cadiz
4th District—JNO. L. GRAYOT .....Henderson
6th District—BEN D. RINGO .....Owensboro
7th District—R. Y. THOMAS .....Central City
8th District—NAT T. HOWARD .....Morgantown
9th District—J. R. LAYMAN .....Elizabethtown
10th District—D. J. WOOD .....Munfordsville
11th District—R. L. DURHAM .....Greensburg
12th District—CHAS. H. SANFORD .....New Castle
13th District—CHAS. A. HARDIN .....Harrodsburg
14th District—ROBT. B. FRANKLIN .....Frankfort
15th District—FRANK G. GREEN .....Owenton
16th District—MAURICE L. GALVIN .....Covington
17th District—WM. A. BURKAMP .....Newport
18th District—JAS. C. DEDMAN .....Cynthiana
19th District—M. J. HENNESSY .....Augusta
20th District—JNO. M. WAUGH .....Grayson
21st District—ALEX CONNER .....Owingsville
22nd District—JNO R. ALLEN .....Lexington
23rd District—JAS. P. ADAMS .....Beattyville
24th District—JOHN F. BUTLER .....Pikeville
25th District—B. A. CRUTCHER .....Nicholasville
26th District—IRA FIELD .....Whitesburg
27th District—WM. LEWIS .....Hyden
28th District—J. N. SHARP .....Williamsburg
29th District—A. A. HUDDLESTON .....Burksville
30th District—JOS. M. HUFFAKER .....Louisville
31st District—A. B. STEPHENS .....Prestonsburg

Digitized by Google

TABLE OF CASES

Adams Express Co. a. Commonwealth_____ 55
Adams Express Co. v. Commonwealth No. 1835_____ 85
Adams Express Co. v. Commonwealth_____ 182
Acton v. Farmer's Home Ins. Co._____ 677
Allen, &c., a. Erwin_____ 458
Austin v. Commonwealth_____ 55
Bardstown, City of a. Nelson County_____ 636
Barbour, &c., a. People's Bank of Kentucky, Assignee_____ 539
Barnett's Adm'r a. Penn's Mutual Life Ins. Co._____ 266
Baske, &c., a. Commonwealth for use of Devoe_____ 468
Bast v. Commonwealth_____ 747
Bell's Trustee v. City of Lexington_____ 463
Bemiss, &c., v. Robertson, &c._____ 397
Berryhill v. Holland_____ 615
Blackwell Coal & Mining Co. a. Brown_____ 324
Blades v. City of Falmouth_____ 259
Boles Adm'r, &c., a. Owsley, &c._____ 775
Bottom v. Fultz_____ 302
Bracken, &c., v. Nicol_____ 628
Brady, &c., a. Mitchell_____ 411
Brown a. Geneva Cooperage Co., &c._____ 16
Brown v. Blackwell Coal & Mining Co._____ 324
Burkhart v. Loughridge_____ 48
Callahan v. Commonwealth_____ 445
Cain's Adm'r v. Ky. & Indiana Bridge & R. R. Co._____ 449
Carnes a. Commonwealth_____ 340
Chapman a. New Galt House Co._____ 527
Chicago, St. L. & N. O. R. R. Co. v. Commonwealth for use of Louisville School Board_____ 497
Chappell, &c., v. Chappell, &c._____ 691
City of Falmouth a. Blades_____ 259
City of Louisville a. Schuster, & Co., &c._____ 189
City of Bardstown a. Nelson County_____ 636
Citizen Tel. Co. v. Westcott's Adm'r_____ 684
City of Lexington a. Bell's Trustee_____ 463
Cincinnati, N. O. & T. P. Ry. Co. v. Giboney_____ 806
Clark's Adm'r v. Farmers Nat. Bank of Richmond, Ky._____ 563
Clay City v. Roberts, &c._____ 594

Digitized by Google

Cole, &c., v. Howard, &c. 812
Columbia Finance & Trust Co. a. Lex. & Carter County Mining & Trust Co. 119
Commonwealth a. Adams Express Co. 182
Commonwealth a. Adams Express Co. No. 1835 160
Commonwealth v. Adams Express Co. 85
Commonwealth v. Austin 55
Commonwealth a. Bast 747
Commonwealth a. Callahan 445
Commonwealth v. Carnes 340
Commonwealth a. Diamond 418
Commonwealth v. Hardy 375
Commonwealth v. Hargis 356
Commonwealth a. Huffaker 115
Commonwealth a. International Harvester Co. 543
Commonwealth a. Jones 26
Commonwealth a. Shipp 643
Commonwealth a. Stevens 32
Commonwealth by Alexander, &c. v. Mitchell, Cassell & Baker 581
Commonwealth by &c., v. Cumberland Tel. & Telg Co. 535
Commonwealth for use of Devoe v. Baske, &c. 468
Commonwealth for use of Louisville School Board v. Chicago, St. L. & N. O. R. R. Co. 497
Conn's Adm'r a. Dinning 623
Commissioner's Sinking Fund of Louisville a. Weimer 377
Cornett a. Smith 63
Corsicana Cotton Factory, &c., a. Robinson, Norton & Co. 435
Cornett a. Fox, &c. 139
Crawford a. Duff 73
Crafton, &c., v. Inge, &c. 89
Crawford's Adm'r v. Travelers Ins. Co. of Hartford, Conn. 733
Conniff v. Louisville, H. & St. L. Ry. Co. 763
Cumberland Tel. & Telg. Co. a. Commonwealth by &c. 535
DeLang a. Illinois Life Ins. Co. 569
Devers v. Martin, &c. 387
Devers v. May, &c. 387
Diamond v. Commonwealth 418
Dinning v. Conn's Adm'r 623
Dorris v. Warford 768
Douglass a. O'Sullivan's Trustee 243
Duff v. Crawford 73
Eastern Ky. Tel. & Telg. Co. a. Evans 620

Digitized by Google

Eberhart and Others v. Wahl's Admr.—Johnson, &c. a. Ward, &c.

Eberhardt and others v. Wahl's Adm'r 223
Elliott, &c., v. Leslie 553
Elrod v. Gastineau 609
Erwin v. Allen, &c. 558
Evans v. Eastern Ky. Tel. & Telg. Co. 620
Estep, &c., v. Estep, &c. 421
Falmouth, City of a. Blades 259
Farmers Home Ins. Co. a. Acton 677
Farmers Nat'l Bank of Richmond, Ky., a. Clark's Adm'r 563
Fitzpatrick a. Noel 787
Flarsheim & Co., &c., a. Westheimer & Co. 480
Flood's Trustee a. Scott Bros. 739
Ford's Adm'r v. Paducah City Railway 488
Ford v. Providence Coal Co. 517
Ford, &c., v. Moss, Judge 288
Ford a. Merchant's National Bank 403
Forrester, &c., v. Howard, &c. 215
Fox, &c., v. Cornnett 139
Francis v. Lilly's Executrix 230
Gastineau a. Elrod 609
Geisler v. Geisler 292
Geneva Cooperage Co., &c., v. Brown 16
Giboney a. Cincinnati, N. O. & T. P. Ry. Co. 806
Goode & Co. a. Lexington Brewing Co. 476
Gregory v. Slaughter 345
Grigsby's Adm'r a. Throgmorton 512
Hagins, &c., a. Sewell 588
Hardy v. Commonwealth 375
Hargis a. Commonwealth 356
Henry County a. Mitchell 833
Holland a. Berryhill 615
Hopkins, &c., a. Slusher 44
Howard, &c., v. Cole, &c. 812
Howard, &c., a. Forrester, &c. 215
Hudgins a. L. & N. Ry. Co. 79
Huffaker v. Commonwealth 115
Illinois Central Ry. Co. v. Young 8
Illinois Life Ins. Co. v. DeLang 569
Inge, &c. a. Crafton 89
International Harvester Co. of America v. Commonwealth 543
Johnson a. Mivelaz 251
Johnson, &c., a. Ward, &c. 1

Digitized by Google

Jolly v. Miller 100
Jones v. Commonwealth 26
Kevil, &c., a. Orr, &c. 720
Ky. & Indiana Bridge & R. R. Co. a. Conn's Adm'r 449
Lexington, City of a. Bell's Trustee 463
Lexington Brewing Co. v. Goode & Co. 476
Lexington & Carter County Mining Co., &c., v. Columbia Finance & Trust Co. 119
Leslie a. Elliott, &c. 553
Lindsay's Adm'r a. Metropolitan Life Ins. Co. 707
Lilly's Executrix a. Francis 230
Louisville H. & St. L. Ry. Co. a. Conniff 763
L. & N. R. R. Co. v. Wilson 836-846
Louisville, City of a. Schuster & Co., &c. 189
Louisville Sinking Fund Commissioners a. Weimer 377
L. & N. R. R. Co. v. Scomp 330
L. & N. R. R. Co. v. Hudgins 79
Loughridge a. Burkhardt 48
Maninni a. Sumrall 67
May, &c., a. Devers 387
Martin, &c., a. Devers 387
Merchant's National Bank v. Ford 403
Metropolitan Life Ins. Co. v. Lindsay's Adm'r 707
Miller a. Jolly 100
Mitchell v. Brady, &c. 411
Mitchell, Cassell & Baker a. Commonwealth by Alexander, &c. 581
Mitchell v. Henry County 833
Mivelaz v. Johnson 251
Mitchell v. Southern Ry. Co. 146
Morath's Ex'r v. Weber's Adm'r, &c. 128
Morgan and others v. Renfro 314
Moss, Judge a. Ford, &c. 288
Monarch Oil, Gas & Coal Co. v. Richardson 602
Murray v. Murray, &c. 426
Nelson County v. City of Bardstown 636
New Galt House Co. v. Chapman 527
Nicol a. Bracken, &c. 628
Noel v. Fitzpatrick 787
Orr, &c., v. Kevil, &c. 720
O'Sullivan's Trustee v. Douglass 243
Owsley, &c., v. Boles' Adm'r, &c. 775
Paducah City Railway a. Ford's Adm'r 488

Digitized by Google

Penn v. Rhodes, &c. 798
Penn's Mutual Life Ins. Co. v. Barnett's Admr. 266
People's Bank of Kentucky, Assignee v. Barbour, &c. 539
Planter's State Bank v. Shclamp, &c. 295
Providence Coal Co. a. Ford .517
Physioc a. South Covington & Cincinnati Street Ry. Co. 153
Pulliam v. Sells, &c. 310
Postal Telg. Cable Co. v. Terrell 822
Raymer v. White School District No. 18 96
Renfro a. Morgan and others 314
Richardson a. Monarch Oil, Gas & Coal Co. 602
Rice v. Rose 669
Robertson, &c., a. Bemiss 397
Rose a. Rice 669
Rhodes, &c. a. Penn 798
Roberts, &c., a. Clay City 594
Robinson, J. M. Norton & Co. v. Corsicana Cotton Factory Co. 435
Schlamp, &c., a. Planter's State Bank 295
Scomp a. L. & N. R. R. Co. 330
Schuster & Co., &c., v. City of Louisville, &c. 189
Scott Bros. v. Flood's Trustee 739
Sells a. Pulliam, &c. 310
Sewell a. Hagins 588
Shipp v. Commonwealth 643
Slemp, &c., a. Tyler 209
Stanley's Adm'r, &c., a. Spradlin 701
Slusher, &c., v.v Hopkins, &c. 44
Slaughter a. Gregory 345
Smith v. Cornett 63
Smith, &c., v. Stevens 780
Southern Ry. Co. a. Mitchell 146
South Covington & Cincinnati Ry. Co. v. Physioc 153
Spradlin v. Stanley's Adm'r, &c. 701
Stevens v. Smith, &c. 780
Stevens v. Commonwealth 32
Sumrall v. Mannini 67
Taylor a. Taylor, E. H., Jr., & Sons 173
Taylor, E. H., Jr., & Sons v. Taylor 172
Terrell a. Postal Telg. Cable Co. 824
Throgmorton v. Grigsby's Adm'r 512
Travelers Ins. Co. of Hartford, Conn., v. Crawford's Adm'r 733
Tyler v. Slemp, &c. 209

Digitized by Google

Walters a. Woodmen of the World 663
Wahl's Adm'r a. Eberhardt and others 223
Ward, &c., v. Johnson, &c. 1
Warford a. Dorris 768
Weber's Adm'r, &c., a. Morath's Ex'r 138
Wescott's Adm'r a. Citizen's Tel. Co. 684
Westheimer & Co. v. Florsheim & Co., &c. 480
White School District No. 18 a. Raymer 96
Wilson a. L. & N. R. R. Co. 836-846
Weimer v. Commissioner's Sinking Fund of Louisville 577
Woodmen of the World v. Walters 663
Young a. Illinois Central Ry. Co. 8

Digitized by Google

Digitized by Google

DECISIONS

OF THE

COURT OF APPEALS OF KENTUCKY

SEPTEMBER TERM, 1906

CASE 1—ACTION BY GRACE A. WARD AND OTHERS AGAINST THOMAS N. JOHNSON AND OTHERS TO ASCERTAIN THEIR RIGHTS UNDER CERTAIN DEEDS MADE BY THEIR FATHER TO THEM.—December 6.

Ward, &c. v. Johnson, &c.

Appeal from Hickman Circuit Court.

R. J. Bugg, Circuit Judge.

From the judgments both parties appeal. Reversed on original and affirmed on cross-appeal.

1. Advancements—Parol Gift of Land—Subsequent Conveyance Rents—Where a father settled three of his daughters on land promising to make them deeds, and telling them they could improve it and pay the taxes, and that they would not have to account for rents and that it should be their land, to which he subsequently made each of them deeds, the land should be treated as an advancement as of the date when the deeds were made, and the gift perfected, but his delay in making the deeds did not make them liable for rents.
2. Decedents' Estates—Distribution—Value of Advancements—How Determined—In the distribution of a parent's estate each child must account for any advancement made by its parent at its real value. The value of the property at the time the gift was made may be considered by the court, in connection with other proof in determining its real value,

Digitized by Google

but it is not conclusive, and where land is given, the enhancement of the value of each tract, by reason of permanent improvements put upon it by the donee should be excluded.

ROBBINS & THOMAS Attorneys for Appellants.

AUTHORITIES CITED.

Clark v. Clark, 17 Ben Moore, 707; Oliver v. Kirk's Heirs, 3 Metcalfe, 273; Bowles v. Winchester, 13 Bush, 11; Mountjoy v. McGinnis, 2 Duvall, 186.

JOHN E. KANE for Appellees.

Bunnell v. Bunnell, 64 S. W. 420; Brewster on Conveyances, Sec. 298; Shawhan v. Shawhan's Adm'r, 10 Bush 600; Hill's Guardian v. Hill, &c., 92 S. W. 924.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON.

T. B. Johnson died intestate on February 19, 1904, a resident of Hickman county. He was twice married. By his first wife he had two children, who survived him, Grace A. Ward and M. E. Evans. By his second wife he had eight children who survived him, the youngest of whom at his death was twelve years of age, and several of the others were infants. His first wife's maiden name was Jewell. She inherited fro u her father a one-third interest in a tract of land which was divided between her and her two brothers. The part falling to her was of value greater than that allotted to her brother William, and to equalize them she was required to pay him $520. Her husband paid this, and her two brothers conveyed to her and her husband jointly 178 acres of land out of the tract belonging to her father. In addition to this, Johnson owned in his own right five or six hundred acres of land. On March 22, 1902, in consideration of love and affection, he conveyed to M. E. Evans 65 acres of his

Digitized by Google

own land. On November 9, 1903, he conveyed to Grace A. Ward 101 acres of land, which was part of the 178 acres falling to her mother, and on the same day conveyed to Mattie Lochridge 71 acres of his own land. Mattie Lochridge was the oldest child by his second wife. On the same day a deed was drawn by which he conveyed all his remaining lands to his other seven children. He, on January 6, 1904, gave to the clerk the deed to Mrs. Ward and Mrs. Lochridge, with the money to pay for recording them, directing them to be recorded. The other deed to the younger children for the remainder of his land he acknowledged at that time before the officer, but did not then have it recorded. This deed, after his death, was caused to be recorded by the grantees. This controversy arose between the children as to their rights under the deeds referred to.

It was insisted that the deeds were void because the grantor had not sufficient capacity at the time they were made. The circuit court held otherwise, and we think the evidence fully sustains his judgment in this matter.

It was also insisted that the deed to the seven younger children was not delivered by him, and therefore did not take effect. The circuit court under the evidence properly rejected this view. There was sufficient, evidence to show a delivery of the deed although it had not been put to record.

The circuit court also properly held that, as the first wife owned one-third of the Jewell land by inheritance, only two-thirds of it passed by the deed from her two brothers to her and her husband, and that this two-thirds passed equally to her and her husband, so that she owned two-thirds of this tract, and her husband one-third.

The evidence shows that Johnson settled his three

Digitized by Google

daughters upon the tracts of land which he afterwards conveyed to them, promising to make each of them a deed, and telling them that they could improve it and pay the taxes, and that they would not have to account for any rents, and that it should be their land. When he subsequently conveyed the land to them, he simply carried out the agreement which he had made with his daughters when he settled them on the land. The land should be treated as an advancement as of the date when the deeds were made and the gift perfected. The daughters are not to be charged with any rents upon this property, for this would be to make a different arrangement from that which the parties made. The father did not give them the use of his land. He gave them the land, and allowed them to use their own land. His delay in making the deeds did not make them liable for rents. In Bowles v. Winchester, 13 Bush, 14, this Court said: "The well-settled doctrine on this subject in this State is that the property must be estimated at its value when the gift is perfected; that so long as the gift or devise is revocable, although the donee may be in possession with the right to use it without accounting for rents by reason of the parol gift, he is chargeable with its value at the testator's death, or when the gift is perfected, and not when the possession was delivered."

Each of the three daughters must account for the value of the land so conveyed at the time it was conveyed to her, but they are not liable for the rents on the land which they held under the parol gift. The cases in which rents of land were charged as an advancement were where there was no gift of the land. Ford v. Ellingwood, 3 Metc., 359; Montjoy v. Maginnis, 2 Duv., 186. In the deed to Mrs. Evans is this language: "I hereby value said sixty-five acres of land at the sum of two thousand dollars ($2,000.00)."

Digitized by Google

In the deed to Mrs. Lochridge is this language: "In making this deed to this daughter I consider that I have given her her just share of my estate, both real and personal, and I stipulate that she shall have no further claim in my estate either in realty or personal property." In the deed to Mrs. Ward the same language occurs. The rule is that a child must account for any advancement made by the parent at its real value. The valuation of the property fixed at the time may be considered by the court in connection with the other proof in determining its value, but it is not conclusive. If the parent undervalues the property, he cannot in this way, by making the deed, avoid the operation of the statute and favor one child above another. If he overvalues the property, the result is the same. The property was a gift, and in the settlement of the estate each child must account for what he received, without regard to the value that the parent fixed upon it. The statement in the deeds of Mrs. Lochridge and Mrs. Ward that he considered he had given each of them her just share in his estate, and that he stipulated that each of them should have no further claim in the estate, is equally ineffective. He could by a will have disposed of his entire estate, but he could not by making advancements by deed charge one of his children more for the property conveyed than the property was in fact worth. He was as powerless to put the property to the child at more than it was worth as he was to convey it to her for less than it was worth. The statute operates upon the estate which he left. It requires each child to be charged with such advancements as he has received, and the testator's intentions or his views cannot control the facts, unless he expresses his intention by a will disposing of his estate. Hook v. Hook, 13 B. Mon., 526;

Digitized by Google

Gordon v. Gordon, 1 Metc., 289; Bowles v. Winchester, 13 Bush, 6.

Mrs. Evans by accepting the deed made to her in March, 1902, for 65 acres of her father's land, in no way waived any right she had as the heir-at-law of her mother to half of two-thirds of the 178-acre tract, and she is entitled to have her part of the 178-acre tract set apart to her, for two-thirds of this 178-acre tract was not the property of her father, except that he had an estate for life in it as tenant by the curtesy.

The 101 acres conveyed to Mrs. Ward was a part of the 178-acre tract. Her father owned in this 101 acres an undivided one-third interest. He also owned as tenant by the curtesy a life estate in the other two-thirds. The advancement to Mrs. Ward should be ascertained by determining the value of the 101 acres at the time she was given the deed to it. She should be charged one-third of this value, which represents the interest which her father owned in his own right, and she should also strictly be charged with the value of her father's life estate, estimated as of that date, in the remaining two-thirds. But in view of the condition of his health at the time the deed was made, his life estate was of no practicable value, and need not be considered. Mrs. Evans should be allotted her part of the 178-acre tract out of the balance remaining after the 101 acres were cut off to Mrs. Ward so as not to disturb Mrs. Ward, if it can be done without injustice to her. What remains of the 178-acre tract, if anything, will be divided between Mrs. Ward and her father's estate so as to do justice between them, considering what he has heretofore disposed of. Her father's estate is entitled to one-third of the entire tract, less his one-third interest in what he conveyed to Mrs. Ward.

In valuing the three tracts of land conveyed to

Digitized by Google

the three daughters, the enhancement of each tract by reason of lasting and permanent improvements put upon it should be excluded, as the daughter should not be charged with her own means which she has put in the land, but only with what her father gave her, and, if the land was charged to her at its value when the deed was made, in so far as this value is due to her permanent improvements, she would be charged with her own means put in the land. The cost of the improvement is not to be deducted, but only the amount of the enhancement of the property at the date of the deeds by reason of permanent and lasting improvements put on the property by the daughters, or their husbands for them. Mere repairs, or such things as were needed to meet ordinary wear and tear, or to keep the place in as good condition as when received, should not be deducted.

On the return of the case to the circuit court, the advancements to the three children will be computed as above indicated, and the personal estate will be distributed so as, as far as possible, to equalize all of the children.

On the cross-appeal the judgment is affirmed.

On the original appeal the judgment is reversed, and the cause remanded for further proceedings consistent herewith.

January 7, 1907. On petition for rehearing, opinion modified. Whatever is set apart to the estate of T. B. Johnson out of the 178-acre tract as directed in the opinion, should be allotted to his grantee, Thomas N. Johnson under his deed. The opinion is modified to this extent.

Digitized by Google

CASE 2.—ACTION BY UREY YOUNG AGAINST THE ILLINOIS CENTRAL RY. CO. FOR DAMAGES FOR PERSONAL INJURY.—Dec. 6.

Illinois Central Ry. Co. v. Young

Appeal from McCracken Circuit Court.

W. M. REED, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Master and Servant—Injury to Servant—Absence of Negligence—Risk of Servant—In an action by an employe of a railroad company, who was injured by a sliver from a piece of iron striking him in the eye, while assisting a boiler maker in chiseling a plug from the end of a flue therein, it being a part of his duty to assist in such work, the evidence showing that the work was being done in the usual way, and no evidence indicating that the boiler maker was guilty of any negligence in the performance of his work, the injury is one which was liable to happen to one engaged in such employment and for which there can be no recovery.
2. Hazardous Business—Dangers Incident Thereto—Knowledge of Servant—Assumed Risk—In contracting to engage in a hazardous business the employe is presumed to have taken into consideration the hazard or risk to which he must expose himself in prosecuting the work, and an injury received in the line of his employment, which is not due to the use of defective tools or machinery, or the improper use of such tools by his superior, but which was the direct result of a danger incident to the nature of the business in which he was engaged, there can be no recovery therefor.

WHEELER, HUGHES & BERRY for Appellant.

J. M. DICKINSON, TRABUE, DOOLAN & COX of Counsel.

Digitized by Google

POINTS AND AUTHORITIES CITED.

1. "The injury to appellee was the result of a danger incident to the nature of his employment, and against which the master did not contract, and the possible consequences of which the servant assumed."

2. "Pleadings and proof make no issue of gross negligence; it was error to instruct on gross negligence."

3. "Error to refuse to instruct on assumed risk." (Doyle v. Swift Iron & Steel Co., 5 Ky. L. R. 59; O. V. Ry. Co. v. McKinley, 17 Ky. L. R. 1028; O'Bannon v. L. & N. RR. Co., 9 Ky. L. R. 706; Ky. Freestone Co. v. McGee, 25 Ky. L. R. 2211; Gaffney v. Penna. Co. 8th Ky. L. R. 406.

HENDRICK, MILLER & MARBLE for Appellee.

POINTS AND AUTHORITIES.

1. Appellee was entitled to a judgment on the pleadings because the general denial of negligence avails nothing as long as the answer fails to deny the facts alleged in the petition as constituting the negligence.

2. Appellee cannot complain of court's refusal to give a peremptory instruction in its favor where the evidence not only tended to support appellee's allegations of fact, but showed that every single fact alleged in the petition as constituting negligence was absolutely and literally true.

3. Under the general plea of negligence all degrees of negligence may be proved.

> "Any degree of negligence however gross may be proved under a general averment of negligence." (Sherman & Redfield on Negligence, Vol. 1, Sec. 7, 4 ed.)

> "This court has held, and such is the law, that under the general allegation of negligence in common law actions for injuries, you may establish the degree by proof and it is not necessary to allege this degree, whether gross or ordinary, in order to make a cause of action, the averment of negligence being sufficient." (L. & N. R. R. Co. v. Rains, 15 Ky. Law Rep. 423.)

4. But in the petition in this case the actual facts set forth show gross negligence if true, and in that case it would not

Digitized by Google

have been necessary to use the word "gross" in order to allege the degree of negligence.

And after all, if the petition had been in this respect defective, issue having been joined, proof heard, and the jury instructed that the negligence must be gross to warrant a verdict for plaintiff, the defect would have been cured by the verdict, if such defect had existed. (City of Louisville v. Snow's Adm'r., 21 Ky. Law Rep., 1268; City of Covington v. Diehl, 22 Ky. Law Rep., 995; Mass. Benefit Ass'n v. Richart, 99 Ky. Law Rep., 302.)

And pleadings will be liberally construed for the purpose of sustaining a verdict. (Murray v. Booker, 27 Ky. L. R. 781. See also Harlow v. Supreme Lodge, &c., 23 Ky. L. R., 456; C. & N. R. R. Co. v. Venable, 23 K. L. R., 427.)

4. The abstract principle that a servant assumes the risks necessarily incident to his occupation is not here denied, but the Court has so often held that it is proper to refuse to submit abstract principles by instruction to a jury, we decline to quote authorities. The instructions given by the Court clearly and concisely submitted the issue to the jury and upon the whole, excepting the peremptory instruction offered and refused, were as favorable to the appellant, or more so, than those offered by its attorneys, and submitted the real questions involved very clearly to the jury.

The identical instructions as to assumed risk which appellants offered were expressly condemned by this court in the case of Pfisterer v. Peter & Co., 25 Ky. Law Rep., 1605.

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

Urey Young brought suit in the McCracken circuit court for $2,000 damages for the loss of an eye, caused by the alleged negligence of the Illinios Central Railroad Company while he was engaged at work as a boiler maker's helper in its shops at Paducah, Ky. The company's answer was a traverse and a plea of contributory negligence. Issue was joined, and, upon trial, a verdict was rendered against the company for $2,000, and it appeals.

The evidence is not conflicting, and the whole question of the company's liability rests upon the

Digitized by Google

fact as to whether or not the injury to appellee was the result of a danger incident to the nature of his employment, and against which the company did not contract. If it was, the company is not liable; if it was not, then the company is liable. Appellee was a man 25 years old, and had been engaged in the company's employ for perhaps six weeks, and under the particular foreman with whom he was working when injured for about three weeks. Upon the day that he was injured he was engaged as helper to a boiler maker named Knapp, in the repair of a boiler. They had been at work in the forenoon cleaning the flues, and upon returning to work after dinner they at once went to work inside the boiler, Knapp leading the way. Appellee was told to hold his light so that Knapp could see, and, as he raised it above Knapp's head, Knapp struck a chisel with a hammer for the purpose of cutting out a plug or key which they were trying to remove from the end of the flue, and a sliver or piece of iron struck appellee in the eye, destroying the sight thereof. Appellee testifies that he had, during his employment at appellant's shop, been engaged in the repair of boilers; that he was familiar with the method used in removing the "plugs," and that they had theretofore used chisels for that purpose, but that they had been driven by means of air, and not with a hammer; that when he got into the boiler the boiler maker, Knapp, struck before he (Young) knew that he was going to strike; and that, at the time, he was standing to the right of and about two feet away from Knapp. This was the testimony as to how the injury occurred, as detailed by appellee.

A part of the duty of appellee as helper to the boiler maker was to assist in removing the plugs or keys which held the tubes in place. These plugs or

Digitized by Google

keys were wedge shaped, and could generally be removed by tapping on the sides thereof with a hammer. In thus attempting to remove them they were sometimes broken, and when so broken they could usually be driven out by the use of a rod driven against them from the opposite end; and when both of these methods for their removal failed, they had to be chiseled out. On the day in question, the plug had been broken off, and, as they had, in the forenoon, been unable to drive it out by means of a rod, their purpose in going into the boiler in the afternoon was to chisel it out. Appellee says that they had used air chisels, which are the same as was used when appellee was injured, except that the air chisel is driven or propelled by air pressure instead of by hand power. Clearly, it is immaterial what kind of motive power is used, as the chisel must in any event be driven with sufficient power to cut the plug or key out of the flue. Appellee must have known the purpose for which they entered the boiler. He held the light so that Knapp could see how to cut away the plug or key. He was standing by his side, not two feet away. He must have been looking in the direction of the point where Knapp was using the chisel, and could not have avoided seeing what he was doing. From the very nature of the work, some employment is more dangerous than others, and those who accept employments which, from their very nature, are more or less hazardous and dangerous, do so at their own risk—or, as has been often and aptly said by this court, they assume the risk incident to the nature of their employment. Ohio Valley Ry. Co. v. McKinley, 33 S. W., 186, 17 Ky. Law Rep., 1028; O'Bannon v. L. & N. R. Co., 6 S. W., 434, 9 Ky. Law Rep., 706; Ky. Freestone Co. v. McGee, 88 S. W., 1113, 25 Ky. Law Rep., 2211; Gaffney v. Pennsylvania

Digitized by Google

Co., 1 S. W., 677, 8 Ky. Law Rep., 416. "The servant is presumed to have contracted with reference to all of the hazards and risks ordinarily incident to the employment; consequently, he cannot recover for injuries resulting to him therefrom." Wood on Master and Servant, page 672. It is the duty of the employer to exercise reasonable care to prevent accidents, to provide his employes with tools and machinery suitable for the work in which they are engaged, and to keep the same in reasonably safe condition and repair. He is not called upon nor required to use the latest and most improved patterns of machinery, and is not liable for injury which might have been avoided by the use of such machinery. He is bound only to the extent that such tools and machinery as he does employ are reasonably safe and suitable for the work to be done. In the case at bar the tools used by the servant Knapp were of the simplest character, and appellee must have known, and did know, that, when the iron plugs are cut away by the chisel, the particles of iron will fly in different directions, dependent upon the angle at which the chisel is held. In thus cutting away or removing the iron plugs from the hole, it was absolutely necessary that the one using the chisel should be stationed close to the plug—within a few feet of it. Knapp was so stationed, and his helper, appellee, was stationed right beside him, and not over two feet away. The very nature of the business in which they were engaged required that he should be there, and appellee had to hold the light above Knapp's head, in order that he might see how to hold and adjust the chisel so as to cut to advantage. The business in which they were engaged was hazardous, but not more so to the helper than to Knapp, the boiler maker, and the position or place in which appellee was required

Digitized by Google

to stand was not more hazardous than could be avoided. He had to stand near by Knapp, in order to render the assistance needed to enable him to see to do the work in which they were engaged, and which they had been employed to do.

If there was any negligence at all in this case, it was in the failure of the boiler maker, Knapp, to call the attention of his helper to the fact that he was about to strike a blow upon the chisel—or, in other words, was about to begin work. Knapp could not see how to do the work until the light was so held as to enable him to adjust the chisel to advantage. He told appellee to hold the light above his (Knapp's) head, and, as he did so, Knapp commenced chiseling away the plug. It is not charged that he stationed appellee in a place more dangerous than was necessary, or that he struck the blow with the hammer in any other than the usual, proper, and needed way to make the chisel cut. If notice was required before the first blow was struck by the hammer, it might with equal propriety be required before each subsequent blow was struck, for there was the same danger accompanying each subsequent blow of the hammer, if the work progressed, as it could only progress as the particles of iron were cut out of the plug. We do not believe that such is the rule, or that Knapp was required or called upon to notify appellee before he struck with the hammer. Appellee's duty as helper required him to be where he was. He was bound to know that, where iron is chiseled off, the particles fly from the chisel. The business was of such a nature that there was at all times some slight danger of being hit in the face or eye by the flying particles. In order to properly discharge his duty as helper, he had to see where he was holding the light —had to use his eyes as well as his hands, just as

Digitized by Google

his superior; the boiler maker, had to do. Knapp was proceeding in the only way he could proceed to cut the plug out of the flue. Appellee knew this. The boiler was not in the shop, but out in the yard, hence they could not use the compressed-air power, and had to resort to the hand hammer. But there is no proof whatever that it was used in any other than a proper manner, or that appellee was placed in a position more hazardous than the character and nature of the business required. The injury was not one against which Knapp, or the appellant company could provide, or which they could foresee, but it was one which was liable to happen to any one engaged in that business or undertaking. Few businesses are conducted in which there is not some danger or liability of injury, but it will not do to say that, whenever injury results, the master or employer is liable. The better rule is that where the employer provides the employe with tools and machinery reasonably safe to do the work in which he is engaged, and keeps them in reasonably safe condition, and provides a reasonably safe place to work, that he has done his duty toward the employe, and the latter, when thus equipped, assumes the risks incident to the business. The application of any other rule would be most unjust, and would make the employer the insurer against injury to his employes. It would relieve the employe of all responsibility and care for his own safety and protection from injury. In contracting to engage in a hazardous business, the employe has the right and is presumed to have taken into consideration the hazard or risk to which he must expose himself in prosecuting the work, and to have provided therefor by exacting and receiving more pay than he would, or could, receive for the performance of labor less hazardous. This the law

Digitized by Google

presumes, for no one of ordinary intelligence would engage in a hazardous undertaking for the same pay that he would in a business in which there was little or no risk or hazard. Appellee was a man of mature years. He had had experience in the business in which he was engaged. He was injured while in the discharge of a duty within the lines of his employment. The injury was not due to the use of defective tools or machinery, or to the improper use of the tools with which his superior was working, but was the direct result of a danger incident to the nature of the business in which he was engaged, and, being such, he cannot recover.

The trial court should have sustained appellant's motion for a peremptory instruction, and for this reason the judgment is reversed and case remanded, with directions for further proceedings consistent with this opinion.

CASE 3.—ACTION BY REUBEN BROWN AGAINST THE GENEVA COOPERAGE COMPANY AND OTHERS FOR DAMAGES FOR PERSONAL INJURY.—Dec. 6.

124 16
126 103

124 16
f130 200

124 16
f138 253
f138 255

Geneva Cooperage Co. &c. v. Brown

Appeal from McLean Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Judgment for plaintiff. Defendants appeal. Reversed.

1. Time—Computation—Days Including First Day—Limitation of Actions—Under Ky. Stats., 1903 sec. 2516, providing that

Digitized by Google

an action for personal injuries shall be commenced within one year after the accrual of the cause of action, an action commenced September 19, 1904, for injuries received September 19, 1903, was barred, since, in computing the time within which the action must be commenced, the day of the injury must be included.

2. Same—Sunday—Ky. St. 1903, sec. 454, providing that if any proceeding is directed by law to take place on a particular day of the month, if the day happen to be Sunday, the proceeding shall take place on the next day, does not extend to the provisions in the statute of limitations, and hence the expiration on Sunday of the year within which actions for personal injuries must be brought did not authorize the bringings of such action on the following day.

3. Limitation of Actions—Parties—The institution of an action against a concern alleged to be a corporation, but which was in fact a partnership, was not the commencement of an action against the individual owners and operators of such concern, so as to suspend the running of limitations as to them.

JOE H. MILLER for Appellants.

SWEENEY, ELLIS & SWEENEY of Counsel.

POINTS AND AUTHORITIES.

1. The demurrer to the petition as amended should have been sustained.

2. The accident complained of by appellee having occurred more than one year next before filing said amended petition, the same was barred by the Statute of Limitation. (Kentucky, Statutes, sec. 2516; Leatherman v. Times Co., 88 Ky., 295; Owen v. How ard Insurance Co., 87, Ky., 571; Kent's Commentaries, 142; Dictionary, Vol. 8, 6279; Stanton's Revised Stat. Vol. 2, Chap. 63, must be included.

3. In Statutory provisions of the statute of limitation if the last day to perform an act falls on Sunday, that time can not be extended to next day. (Shefer v. Magone, 47 Fed. Rep., 872; Dorsey v. Pike, 46 Hun., 112; Cooley v. Cook, 125 Mass., 406; Broome v. Wellington, 1 Sandf., 664; Edmundson v. Wragg, 104 Pa., 500; Owen v. Howard Ins. Co., 87 Ky., 571; Hammond v. American Mut. I. Co., 10 Gray, 306; Haley v. Young, 134 Mass.,

Digitized by Google

364; People v. Luther, 1 Mend., 42; Ex. parte Dodge, 7 Con., 147; Kentucky Statutes, section, 2516.)

4. Appellee Brown was within the scope of his employment, and he assumed the risk, and injury was caused by his own negligence. (Kelley v. Barber Asphalt Co., 93 Ky., 363; McCormick Harvester Co. v. Liter, 23 K. L. R., 2154; Witten v. Bell & Coggeshall Co., 27 K. L. R. 580.)

5. The master is not required to furnish an absolute safe place in which the laborer may do his work, and if the work is dangerous the master does not insure against such danger. (Wilson's Admr. v. Chess & Wymond Co., 25 K. L. R., 1655; McCormick Harvester Co. v. Liter, 23 K. L. R., 2155.)

6. The court should have peremptorily instructed the jury to have found for the defendants, for there is no evidence warranting the jury to consider the case, nor any evidence to sustain said verdict. (I. C. R. R. Co. v. Keebler, 27 K. L. R., 305; McCormick Harvester Co. v. Liter, 23 K. L. R., 2155; Wilson Adm'r v. Chess & Wymond Co., 25 K. L. R., 1655.)

G. W. HICKMAN, J. W. BOSTON AND LAWRENCE P. TANNER Attorneys for Appellee.

POINTS AND AUTHORITIES.

1. The demurrer to the petition, as amended, was properly over-ruled by the court. (Teets v. The Snider Mfg. Co., 27 Ky. Law Rep., 1061; Pike, Morgan & Co. v. Wathen, 25 Ky. Law Rep., 1264.)

2. The injury having occurred on the 19th day of September, 1903, plaintiff had until the 19th day of September, 1904, to commence his action, as the court will judicially know that the 18th day of September, 1905, was Sunday. (Owen v. Howard Ins Co., 87 Ky., 571; Hammond v. Am. Ins. Co., 10 Gray 307; Edmonson v. Wragg, 104 Penn., 501; Keits v. Temple, 48 Mo., 75; Barrett v. Allen, 10 Ohio, 426; Chicago v. Vulcan Iro Wks., 93, Ill; I. Greenleaf's Evidence, sec. 5; Wharton's Evidence, sec. 282.)

3. Appellants, and not appellee, assumed the risk of injury, when they ordered him to do the thing which resulted in his injury. (I. C. R. R. Co. v. Keeber, 27 Ky. Law Rep., 305; Ross-Paris Co. v. Brown, 28 Ky. Law Rep., 813; Lasch v. Stratton, 101 Ky., 672; Wake & Co. v. Price, 22 Ky. Law Rep., 696; I. C. R. R. Co. v. Langhan, 25 Ky. Law Rep., 500; Thompson on Negligence, secs. 4664-4676; Beach, Cont. Neg., 311-350; Wood, Master & Serv. pp. 676, 699, 837 and 843.)

4. The lower court properly submitted the questions in issue

Digitized by Google

and as to damages to the jury. (Witten, By etc. v. Bell & Coggenshall, 27 Ky. Law Rep., 580; McFarland's Adm'r v. Harbison & Walker Co., 26 Ky. Law Rep. 746.)

5. The allegations of the petition, as amended on September 19th, 1904, are to be taken as true, as to defendant Hazzard, since he failed to answer. (Civil Code, secs. 126-386; Evans v. Stone, 80 Ky., 78; L. & N. R. R. Co. v. Lawes, 21 Ky. Law Rep., 1795; Posey v. Green, 78 Ky., 165; Pomeroy, Rem. & Remedial Rights, sec. 596; Western Ins. Co. v. Ray & Co., 20 Ky. Law Rep., 1360; Mast, etc. v. Lehman, 100 Ky., 464.)

6. The instructions of the court, and rulings of the court, were more favorable to appellants than they were entitled to under the law.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

To recover damages for injuries sustained on September 19, 1903, in operating a hoop cutter, the appellee on May 12, 1904, instituted an action against the Geneva Cooperage Company, alleging that it was a corporation created under the laws of the state of Ohio. The summons that issued on the petition was executed on W. J. Hazard, the chief agent and manager of the company. On September 19, 1904, Hazard filed an affidavit, denying that the Geneva Cooperage Company was a corporation, and averring that H. B. Gregory and J. M. Gregory were partners doing business under the partnership name of the Geneva Cooperage Company, and owned and operated the factory in which Brown was injured. On the same day, September 19, 1904, the plaintiff, now appellee, filed an amended petition against H. B. Gregory and J. M. Gregory, partners under the firm name of the Geneva Cooperage Company, and W. J. Hazard. Summons on this pleading was executed on the defendants on September 19, 1904. On November 7, 1904, Hazard filed a demurrer to the original and amended petitions, and H. B. Gregory and J. M.

Digitized by Google

Gregory filed their joint answer, in one paragraph of which they averred that the injuries for which it was sought to recover damages accrued more than one year next before the filing of the amended petition and the commencement of the cause of action against them, and they relied on the statute of limitations in such cases made and provided as a bar to any recovery against them. A number of other motions were made and pleadings filed.

It being conceded that the Geneva Cooperage Company is a partnership composed of J. M. Gregory and H. B. Gregory the appellants insist that their plea of limitation presented a complete bar to any recovery by appellee, and, if this contention is sustained, it will not be necessary to notice the other alleged errors relied on for reversal. The statute applicable to this question is section 2516 of the Kentucky Statutes of 1903, which provides: "An action for an injury to the person of the plaintiff, or of his wife, child, ward, apprentice, or servant, * * * shall be commenced within one year next after the cause of action accrued, and not thereafter." This court, in Wilson v. I. C. R. Co., 92 S. W., 572, 29 Ky. Law Rep., 148, considered the identical question here involved, and held that as Wilson was injured and died on the 6th of February, 1901, and the action to recover damages was not instituted until February 6, 1902, it was barred by the statute relied on here, as more than a year had expired between the day Wilson died and the institution of the action. Under this statute, the cause of action accrued immediately upon the infliction of the injury, and the statute of limitation commenced to run on September 19, 1903, and, in computing the time within which the action must be commenced, that day must be included.

In the construction of this statute, the word "year"

Digitized by Google

means a calendar year. Ky. Stats., 1903, section 452. And a calendar year is ordinarily and in common acceptation considered to be 365 days. But if the calendar year is computed from a given day in a month, say September 19, 1903, and the time within which the action must be brought expires in one year, it would expire on the next day before the 19th of September of the following year, namely, on the 18th of September. And it happens that in thus com puting the time in this particular case, and counting from September 19, 1903, to September 18, 1904, inclusive, the appellee had 366 days in which to institute this action. Ordinarily there would be included in this period 365 days, but as 1904 was a leap year, one day was added. So that, giving the statute the most favorable construction, and extending the meaning of "calendar year" to its extreme limit, the action is yet barred.

It will be observed that the language of this statute differs in some respects from that used in other sections of the chapter on limitation. It does not conclude that the action shall be commenced "within one year next after the cause of action accrued," but the further words "and not thereafter" are added, so as to remove any possible doubt that might exist as to the meaning and intention of the Legislature.

Nor can there be any question that, under the rule of construction adopted by this court, the day on which the injury occurred must be included. This question has been frequently before the court in the consideration of other statutory provisions, and the construction has been uniform. To illustrate: In construing section 745 of the Civil Code of Practice, which provides that "an appeal shall not be granted except within two years next after the right to appeal

Digitized by Google

has accrued," this court, in Board of Councilmen of Frankfort v. Farmers' Bank, 105 Ky., 811, 20 Ky. Law Rep., 1635, 49 S. W., 811, reviewed fully the authorities, and held that an appeal filed on January 21, 1898, from a judgment rendered on January 21, 1896, was too late—quoting with approval the language of Judge Simpson in Chiles v. Smith's Heirs, 13 B. Mon., 460, in which it was announced that "the rule in regard to the computation of time seems to be that, when the computation is to be from an act done, the day in which the act is done must be included, and hence, since there is no fraction of a day, the act relates to the first moment of the day in which it was done. But when the computation is to be from the day itself, and not from the act done, then the day in which the act was done must be excluded." Here the computation must be from an act done, namely, the injury to the person, and consequently the day on which the injury was done must be included.

It is said, however, that the 18th day of September, 1904, fell on Sunday, and as the action could not have been instituted upon that day, the person entitled to bring the suit should be allowed the whole of the next day in which to institute his action; and in support of this proposition our attention is called to Owen v. Howard Ins. Co., 87 Ky., 571, 10 Ky. Law Rep., 608, 10 S. W., 119, which was a suit upon an insurance policy providing that no action upon it could be maintained unless commenced within 12 months next after the fire occurred, and, as the last day of the year was Sunday, it was held that the action might be instituted on the following day, the court resting its conclusion upon the ground that, as the statute of limitation relied on was the result of a contract, it should be fairly and equitably construed

Digitized by Google

to effect the intention of the parties, and relieve the contract of an interpretation that would defeat its enforcement. And this seems to be the view generally taken in the construction of limitation clauses in contracts, although intervening Sundays will be counted. It is only when the day of performance falls on Sunday that it will be excluded and the next day allowed. Salter v. Burt (N. Y.) 32 Am. Dec., 530; Avery v. Stewart (Conn.) 7 Am. Dec., 240; State v. Michel (La.) 27 South., 565, 49 L. R. A., 218, 78 Am. Stat. Rep., 364. But this rule has never been extended to embrace statutory provisions limiting the time in which an action must be brought. Indeed, there seems to be no good reason why the court should take the liberty of extending the period of limitation fixed by the legislative department, when the time fixed is sufficient to give all persons interested ample opportunity to protect their rights by instituting an action; although it seems to be generally accepted that, when the period of time within which an act must be done is less than a week, an intervening Sunday will be excluded; if more than a week, the Sunday will be included. Am. & Eng. Ency. of Law, vol. 26, p. 10; State v. Michel (La.) 27 South., 565, 49 L. R. A., 218, 78 Am. Stat. Rep., 364. And that rule has been adopted by our court in respect to the time in which an application for new trial must be made. Section 342 of the Civil Code of Practice provides that it shall be made within three days after the verdict or decision is rendered; and, although Sunday is not excluded by the letter of the Code, the rule is that three days means three juridical days, and, if Sunday falls within the time, it will be excluded. Long v. Hughes, 1 Duv., 387. And so with reference to the time within which judgment shall be pronounced in cases of felony, the provision of the

Digitized by Google

Code being that "the court shall not pronounce judgment until two days after the verdict is rendered," and this has been held to mean two juridical days. O'Brien v. Commonwealth, 89 Ky. 354, 11 Ky. Law Rep., 534, 12 S. W., 471.

In other instances, Sunday is expressly excluded by statute. To illustrate, section 760 of the Civil Code of Practice provides: "No mandate shall issue nor decision become final until after thirty days excluding Sundays from the day on which the decision was rendered." And so the Constitution (section 42) declares that "the session of the Legislature shall be sixty days exclusive of Sundays:" and in section 88, that the Governor shall have 10 days in which to return a bill presented to him, Sundays excepted. But, where the statute does not in terms exclude Sundays, and the time fixed in which the act must be done is more than a week, Sunday will be included in computing the time. Brown v. Vailes (Colo.) 27 Pac., 945, 14 L. R. A., 120; Shefer v. Magone (C. C.) 47 Fed., 872; Cooley v. Cook, 125 Mass., 406; Dorsey v. Pike, 46 Hun (N. Y.) 112. For instance, the Civil Code of Practice, in section 44, provides that a summons shall be returnable to the first day of the next term of court which does not begin within 10 days from the date of the summons, and, in determining whether or not process is within the time, Sunday is always included. Ormsby v. City of Louisville, 79 Ky., 197, 2 Ky. Law Rep., 66.

Our attention has been directed to section 454 of the Statutes of 1903, providing that "if any proceeding is directed by law to take place, or any act is directed to be done, on a particular day of a month, if that day happen to be Sunday, the proceeding shall take place or act shall be done on the next day." This section is found in the chapter on the construc-

Digitized by Google

tion of statutes, but its meaning cannot be extended to embrace provisions in the statute of limitations. By its terms, it is confined to a proceeding directed by law to take place, or an act directed to be done, which must be construed to mean in the course of judicial proceedings.

After a full investigation of the authorities and a careful consideration of the question, we cannot escape the conclusion that an action under this statute must be brought within a year, and, if the last day of the year happens to fall on Sunday, the time in which it may be brought cannot be extended to the following day.

Nor was the institution of the action against the Geneva Cooperage Company as a corporation the commencement of an action against H. B. Gregory and J. M. Gregory as partners, although they owned and operated the concern generally known as the "Geneva Cooperage Company." This precise question was determined in Leatherman v. Times Co., 88 Ky., 291, 10 Ky. Law Rep., 896, 11 S. W., 12, 3 L. R. A., 324, 21 Am. Stat. Rep., 342. There Leatherman sued the Times Company as a corporation for libel. After the expiration of a year he discovered that the Times Company was not a corporation, but a private concern owned and published by Haldeman and Logan as partners, and it was held that the institution of the action against the Times Company by that name did not have the effect of bringing the individual members of the company before the court, nor of suspending the statute of limitation as to them. Nor is Teets v. Snyder Heading Mfg. Co., 120 Ky., 653, 87 S. W., 803, 27 Ky. Law Rep., 1061, in conflict with the view herein expressed, as the opinion in that case mentions and distinguishes the opinion in Leatherman v. Times Company.

Digitized by Google

It is also urged that, as Hazard did not file an answer, the judgment went against him by default, and he cannot complain of error that might authorize a reversal as to the Gregories. The amended answer, however, filed in May, 1905, recites that "the defendants H. B. Gregory, etc., by leave of court, amend their answer," so that Hazard in company with his codefendants, did interpose a defense. And all through the record appear motions made by "the defendants." We therefore conclude that, by virtue of the amended answer and motions made, Hazard's rights were as fully protected as if his name had been mentioned in each pleading and motion.

In view of the conclusion reached upon the plea of the statute of limitation, we have not deemed it necessary to investigate the other interesting questions raised by counsel.

Wherefore the judgment is reversed, with directions to enter a judgment dismissing the petition.

CASE 4.—PROSECUTION AGAINST RICH JONES FOR RAPE. —Dec. 7.

Jones v. Commonwealth

Appeal from Trigg Circuit Court.

THOMAS P. COOK, Circuit Judge.

Defendant convicted and appeals. Affirmed.

1. Indictment—Written in Pencil—The fact that an indictment was partly written in pencil will not vitiate it. Had it been wholly written in pencil it would have been legal.

Digitized by Google

2. Former Jeopardy—New Trial—Defendant's Motion—A plea of former jeopardy can not be sustained where, after conviction, the verdict was set aside and a new trial granted on the defendant's motion.

3 Rape—Age of Victim—Necessary Allegation—An indictment for rape need not charge that the female charged with being carnally known was above twelve years of age, as a failure to make such allegation in an indictment must be understood as meaning that the female was above that age.

MATT HANBERRY, JOHN C. DABNEY, AND R. A. BURNETT Attorneys for Appellant.

A reversal is asked in this prosecution.

1. Because the verdict is contrary to the evidence.

2. Because the verdict is contrary to law.

3. Because the court failed to recognize the defendant's plea of former jeopardy or acquittal in the case and instruct the jury upon the same to find him not guilty.

AUTHORITIES CITED.

Ky. Statutes sec. 1154; Nelson v. Commonwealth; 3 Bush 104; 9 Bush 333; 90 Ky. 262; 78 Ky. 93; 88 Ky. 386; 85 Ky. 68. (Sec. 243 and 252 of the Code unconstitutional.)

N. B. HAYS AND C. H. MORRIS for Appeellee.

1. The only grounds upon which a motion in arrest of Judgment may be sustained, is that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

2. The sustaining of a demurrer and re-submission to the grand jury does not constitute jeopardy, and is not an acquittal in any sense of the word.

3. The first trial was no bar to the second trial, nor was it a bar to the re-submission to the grand jury.

CITATIONS.

McLaughlin v Commonwealth, 18 R. 205; Ky. Statutes, sec. 1154; Ky. Criminal Law and Procedure Roberson vol. 1, page 357; Commonwealth v Arnold, 83 Ky., 1; Wells v. Commonwealth, 9 R. 658; Harkins v. Commonwealth, 109 Ky., 545; Criminal Code 270.

Digitized by Google

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This appeal is prosecuted upon a partial record, no bill of exceptions or evidence appearing therein. At the September term, 1905, of the Trigg circuit court an indictment (No. 875) was returned against appellant, charging him with the crime of carnally knowing a woman by force, and against her will and consent. At the same term of the court he was tried and found guilty, his punishment being fixed at confinement in the penitentiary for a period of 20 years. A motion for a new trial was made, and sustained by the court; the grounds therefor not appearing in the record. At the January term, 1906, the court, on motion of the commonwealth's attorney, set aside the first indictment, and resubmitted the case to the grand jury, who, on the 23d day of that month, returned an indictment (No. 944) against the accused, charging him with the same offense. This indictment reads as follows: "Trigg Circuit Court. January Term, 1906. Commonwealth of Kentucky, against Rich Jones. Indictment. The grand jury of Trigg county, in the name and by the authority of the Commonwealth of Kentucky, accuse —— of the crime of rape, committed in the manner and form as follows to-wit: That said Jones did in the county and state aforesaid, on the 12th day of August, 1905, and before the finding of this indictment, willfully, feloniously, and by force, carnally know Corney Thomas, a female, without her consent and against her will, against the peace and dignity of the Commonwealth of Kentucky." This indictment was signed by the commonwealth's attorney and presented by the foreman of the grand jury in open court in the usual form. During that term of the court, the following proceed-

Digitized by Google

ings were had, as shown by the order of court: "Trigg Circuit Court. January Term, 1906. Commonwealth of Kentucky, against Rich Jones. The Commonwealth came by attorney and the defendant was brought into court by the jailer and waived formal arraignment, acknowledged identity of person and entered a plea of not guilty. Thereupon came the following jury (who are named), and the panel being completed, were duly sworn to well and truly try the issue joined; thereupon the defendant by counsel filed a general demurrer to this indictment, and same coming on to be heard, and the court fully advised, doth sustain said demurrer, and orders this prosecution resubmitted to the present grand jury; to which the defendant objected and excepted; and the defendant is ordered held in custody to await the action of the grand jury." On that day the grand jury returned another indictment (No. 973) against the appellant, which was an exact duplicate of indictment No. 944, except the appellant's name, Rich Jones, was inserted in the blank space which appeared therein, and these words were added: "This indictment is returned in lieu of an indictment for the crime this day dismissed by the court with leave to resubmit to the present grand jury." On the following day the appellant was again put upon trial to answer the charge contained in the last indictment, and he filed a plea of former jeopardy, and not guilty. The court evidently ignored this plea, as the trial proceeded, resulting in the conviction of the accused, his sentence being fixed at confinement in the penitentiary for the period of 10 years. Appellant was convicted for the offense named in section 1154, Ky. Stats., 1903.

The first ground urged by counsel as a cause for reversal is that the indictment failed to charge that the female carnally known by the appellant was

Digitized by Google

"above 12 years of age." This question has been settled adversely to appellant in the case of McLaughlin v. Commonwealth, 35 S. W., 1030, 18 Ky. Law Rep., 205. In that case it is said: "The accused was indicted for rape, tried, convicted, and sentenced to the penitentiary for 10 years. The indictment is not defective because it failed to state that Clyde McFerran, upon whom the rape is alleged to have been committed, was over 12 years of age. A rape may be committed on a female of any age, but when she is under 12 years of age the punishment is greater than when she is over that age. When the indictment fails to allege that the female upon whom the rape is committed is under 12 years of age, then it must be understood as meaning she is above that age."

The next ground relied upon is that in the last indictment the name of the appellant, Rich Jones was inserted in the blank space in pencil, as was also the additional words to the effect that the indictment was returned in lieu of another, etc. This fact appears in the record as having been agreed to by the parties. In our opinion, it does not vitiate the indictment, or subject it to demurrer. Had the indictment been written wholly in pencil it would have been legal, and it is none the less so because part of it was in pencil.

The only other question necessary to be considered is whether the court erred in ignoring appellant's plea of former jeopardy. The appellant cannot claim that his plea of former jeopardy should be sustained on account of the first trial, because, after his conviction, on his own motion the verdict and judgment were set aside, which left him in the same position as if there had been no trial. Commonwealth v. Arnold, 83 Ky., 1, 6 Ky. Law Rep., 181, 4 Am. Stat. Rep., 114. The same principle applies to the disposition of the second indictment. It is true, the

Digitized by Google

order shows that he objected and excepted to the action of the court, but this evidently had reference to the resubmission of the case to the grand jury for another indictment. It is certain that the objection and exception taken did not apply to the action of the court in sustaining the demurrer interposed by him. It was his own act which caused the dismissal of that indictment, and it cannot, therefore, be said that this was done against his consent. It has often been decided by this court that a party is in legal jeopardy when he is put upon trial before a court of competent jurisdiction upon an indictment or information which is sufficient in form and substance to sustain a conviction, and a jury has been charged with his deliverance; and a jury is said to be thus charged when they have been impaneled and sworn. The defendant then becomes entitled to a verdict which shall constitute a bar to a new prosecution; and he cannot be deprived of the bar by the dismission of the indictment against his will, or by the discharge of the jury, and a continuance of the case. Under the facts as they appear in this record, the indictment was not dismissed and the jury discharged against appellant's will, but the same occurred by reason of his own acts, which must de deemed to have been by his consent. O'Brian v. Commonwealth, 9 Bush, 333, 15 Am. Rep., 715, Gaskins v. Commonwealth, 97 Ky., 494, 17 Ky. Law Rep., 352, 30 S. W., 1017, and Williams v. Commonwealth, 78 Ky., 93. Entertaining these views, it is not necessary to determine whether indictment No. 944, in its incomplete condition, was sufficient in form and substance to sustain a conviction; conceding it to be so, the record shows it was dismissed, and appellant's jeopardy ceased by reason of his own acts and with his consent.

Digitized by Google

For these reasons, the judgment of the lower court is affirmed.

CASE 5.—PROSECUTION AGAINST R. FLEM STEVENS FOR MURDER.—December 7, 1906.

124 32
125 140

124 32
f134 431
f135 12

124 32
f137 318

Stevens v. Commonwealth

Appeal from Ohio Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Defendant convicted and appeals, Reversed.

1. Criminal Law—Appeal—Evidence.—Where there is some evidence on which to base a conviction, it cannot be set aside on appeal as unauthorized or flagrantly against the evidence.
2. Homicide—Evidence—Reputation of Deceased.—In a prosecution of a peace officer for killing deceased while attempting to restrain him from escaping, evidence concerning decedent's reputation among peace officers in the county, as distinguished from his acquaintances generally, was inadmissible.
3. Criminal Law—Conduct of Trial—Perons Present—Unanticipated Outbreak.—In a prosecution for homicide, it was not error for the court to permit decedent's widow to sit in the courtroom during the taking of testimony, and, while weeping, to make an unanticipated outbreak denouncing defendant, she having been quickly required thereafter to withdraw from the courtroom.
4. Same—Objections—Exceptions—Necessity.—In a prosecution for homicide, the failure of the court to put an earlier end to a sudden outbreak and manifestation of grief on the part of decedent's widow, before the jury, could not be reviewed on appeal, in the absence of an objection and exception taken thereto at the time.
5. Same—Argument of Counsel.—Misconduct of the commonwealth's attorney in his closing arguments to the jury cannot be reviewed on appeal, where it was first presented to

Digitized by Google

the trial court in defendant's motion and grounds for a new trial without any objection taken thereto at the time or request that the court admonish the jury not to consider it, and an exception reserved.

6. Arrest—Necessity of Warrant—Peace Officer—Authority.—Where decendent was both drunk and disorderly in the presence of a peace officer, the officer was authorized to arrest him without a warrant, and hold him until a police justice could be sent for and either try him or commit him in default of bail.

7. Homicide—Preventing Escape of Prisoner.—Where, after defendant had legally arrested decedent for misdemeanor, decedent attempted to release himself from arrest by forcibly overpowering defendant, the latter was entitled to use such force as was reasonably necessary to overcome that used by decedent, even to the extent of shooting and killing him, if it reasonably appeared to defendant that that was the only way of preventing his escaping from defendant's custody, though defendant would have had no right to shoot deceased if he had got away from him and was fleeing to escape.

8. Same—Instructions.—In a prosecution of a peace officer for killing decedent after his arrest for misdemeanor, the court charged that, if decedent refused to submit to the arrest or to remain in the officer's custody, the latter was entitled to use reasonable force to compel him to submit, and if decedent assaulted the officer, the latter was entitled to defend himself and use force reasonably necessary to repel the assault and protect himself from great bodily harm or death at the hands of decedent or overcome the latter's force to resist arrest or continued control after arrest, but that defendant had no right to kill decedent nor to retain custody of his person except as decedent was assaulting defendant, etc. Held, that such instruction was erroneous, as limiting the officer's right to kill to the single ground of self-defense.

H. P. TAYLOR, S. A. ANDERSON and M. L. HEAVIN, Attorneys for Appellant.

POITS AND AUTHORITIES.

1. There is no proof to support an issue of manslaughter, and instructions "II, III and IV" were, therefore, erroneous. (Mackey v. Commonwealth, 80 Ky., page 347; Slagel v. Commonwealth, 81 Ky., page 485; Justice v. Commonwealth, 20 L. R., 390; Montgomery v. Commonwealth, 23 L. R., 732; Stovall v. Common-

Digitized by Google

wealth, 23 L. R., 103; Coffman v. Commonwealth, 51 Ky., 18 B. Mon., 35; Mahan v. Commonwealth, 21 Ky. L. R., 1808.)

2. The danger is not as it appears to the jury, but as it appears to the defendant at the time of thekilling, for the jury may believe now that there was no real danger, still if accused thought in good faith there was, he had the right to kill, and the jury should acquit: (5th R. 67, 103, and 244, 81 Ky., 233; Coffman v. Commonwealth, 10 Bush, page 498; Cockrill v. Commonwealth, 95 Ky., page 25; Munday v. Commonwealth, 11 Bush, 347, 14 B. Mon., 620; Thatcher v. Commonwealth, 24 L. R., 1584.)

3. Whether requested or not it is the duty of the court in criminal cases to instruct the whole law applicable to the issue. (Cook v. Commonwealth, 10 L. R., 222; Buckels v. Commonwealth, 24 L. R., 571; L. & N. R. R. Co. v. Commonwealth, 84 Ky. 457, 113 Ky. 795, 8 L. R., 457.)

4. Presumptions and reasonable doubt defined with this court's approval: (Patterson v. Commonwealth, 99 Ky., 622.)

5. It was competent to show the dangerous reputation of deceased among the peace officers of the county. (Trabue v. Commonwealth, 13 L. R., 343.)

6. This court can not speculate as to the effect of competent evidence, which was, by the trial court, excluded from the jury: (Coppage v. Commonwealth, 3rd Bush, 532; Criminal Code, section 340.)

7. Misconduct of Mrs. Growbarger and Commonwealth's attorney, pro tem., was prejudicial to the defendant's right to a fair and impartial trial. (Blackstone's Commentaries Sharswood's Ed., vol. 4, page 181, 200; Cupp v. Commonwealth, 87 Ky. 41, 42; Cargill v. Commonwealth, 12 L. R., 149.)

N. B. HAYS, C. H. MORRIS, MORRIS & SOUTH, G. B. LIKENE and W. H. BARNES for the Commonwealth.

ON PETITION FOR REHEARING.

We earnestly request the Court to reconsider its opinion, believing in good faith that after a careful examination of the Common Law as laid down by the elementary writers, and as generally adopted by the decisions of the courts of other jurisdictions, it will not establish a rule so radically different from that heretofore adopted by the decisions of this court, and which would place one charged with the slightest violation of the law, after his arrest if he attempt to escape, on the same footing with one charged with the most heinous of crimes. Such a rule could subserve no good purpose to society, would be inhuman in the

Digitized by Google

extreme, and would not be becoming to the majesty of the law.

We feel that after a careful examination of the authorities cited, the court will grant a rehearing of the cause and affirm the judgment of the lower court, for all of which we respectfully pray.

AUTHORITIES CITED.

Bouvier's Law Dictionary; Black's Law Dictionary; Kentucky Criminal Code, sections 42 and 43; Kentucky Statute, section 1338; Risch v. Bailey et al; Opinion filed November 27, 1906. Stevens v. Commonwealth, (Ky.) 20 R., 544; Bowman v. Commonwealth, (Ky.) 16 R. 186; Petrie v. Cartwright (Ky.) 59, L. R. A., 720; Cyc. vol. 3, page 892; Cyc. vol.21, page 797; Am. and Eng. Encyclopedia of Law (2nd ed.) vol. 21, pages 204 and 305; State v. Dierberfer, (Mo.) 10 S. W., 168; Thomas v. Kinkead et al. (Ark.) 15 L. R. A., page 558; Williams v. State, 44 Ala. 41; Clements v. State, 50 Ala., 117; Reneau v. State Sec. Lea. (Tenn.), 720; Brown v. Weaver (Miss.) 42 L. R. A., 423; Conraddy v. People, 5 Park Crim., (N. Y.), 234; Rischer v. Meelan, 11 Ohio Cir. Ct., 403; U. S. v. Clark, 31 Fed. R. 710; Forster's case (Eng.) I. Lewis, 187; Smith v. State, 59 Ark., 132; State v. Smith (Iowa) 67 L. R. A., 292; State vs. Stancill, 128, N. C., 606; Com. v. Rhoads, 23 Pa. Super. Ct., 512; State v. Whittle, 59 S. C., 297; State v. Garrett, 60 N. C., 144; Arthur v. Wells, (S. C.) 2 Mill 314.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, R. Flem Stevens, was indicted and tried in the Ohio circuit court for the murder of W. L. Grawbarger. The jury by their verdict found him guilty of voluntary manslaughter, and fixed his punishment at two years' confinement in the penitentiary. Appellant was refused a new trial in the lower court, and now asks of this court a reversal of the judgment appealed from.

Appellant, at the time of the homicide, was marshal of the town of McHenry, and having been sent for by a barber to remove the deceased from the vicinity

Digitized by Google

of his shop on account of his drunken and disorderly conduct, he went to the shop in question and found deceased in front of and near it. Discovering that he was drunk and boisterous, appellant placed him under arrest and started with him to the McHenry railroad depot, where there was a light, intending after reaching the depot to send for the police judge, that he might immediately issue a warrant against deceased for his misconduct, and make some disposition of the case. Upon reaching the depot deceased, who, down to that time, had quietly submitted to the arrest, refused to enter the building, and thereupon he and appellant got into an altercation, during which the latter shot and killed him. The evidence as to the difficulty was very conflicting. Four witnesses, Hobdy, Maddox, and the two Turners, introduced by the commonwealth, claimed to have seen it. According to their testimony, when appellant opened the door of the depot building, deceased objected to entering, whereupon appellant knocked him down with a pistol, or billy, shot him twice while down, again in the act of rising, then twice more when he fell upon the floor of the east shed of the depot. On the other hand, appellant testified in his own behalf that, upon reaching the depot door, deceased, who was a much larger and stronger man than he, with his left hand grasped appellant's right hand, and holding it as if in a vise, threw his right hand and arm around appellant's neck, thereby pressing his head against deceased's breast, and began to struggle, as if to throw appellant to the floor and kill him, or do him great bodily harm, in view of which, and of threats that deceased had previously made against him, appellant got his pistol from his pocket with his left hand, and shot deceased twice, somewhere in the back, which caused the latter to release

Digitized by Google

his hold of him and to fall down, but immediately getting on his feet deceased advanced toward appellant with the remark, "God damn you, I have not got enough of you yet," and again seized and bore down on him much as he had done before; whereupon appellant, changing the pistol from his left to his right hand, shot deceased three times in front, when he fell to the floor and died. In the main, appellant's version of the homicide was corroborated by Dott and Nall, railroad employes, then in the depot, Gans and Toll who were across the street, and, in some measure, by Miss Pirtle, Bishop, and Cope, who were farther away. In addition to the testimony of the witnesses named, there was some further proof that deceased had, prior to his arrest, in effect, said he would not be arrested by appellant, and that the latter had, in substance, declared he would use his pistol in arresting a man like deceased, or of his kind. Evidence was also introduced by the defense to show that, at the time of the homicide, which occurred at night and under the depot shed, there was a nine-day moon, and that the moonlight was insufficient for the commonwealth's witnesses to see what was done by the parties engaged in the conflict. On the other hand, the testimony of the commonwealth's eyewitnesses to the homicide, and others, was that the light from the moon was sufficient to enable them to see what took place. From all the evidence the jury reached the conclusion that the homicide was not justifiable. As there was some evidence upon which to base the verdict, we are not at liberty to declare that it was unauthorized, nor have we the right to set it aside upon the ground that it was flagrantly against the evidence.

It is insisted for appellant that the trial court erred in refusing to allow him to prove by certain witnesses,

Digitized by Google

of whom the question was asked, that the reputation of deceased among the peace officers of the county was that of a dangerous man. We think the court ruled correctly in excluding such testimony. It was not proper to show what deceased's reputation in the particular named was among peace officers, any more than any other class. It was, however, competent to show that such was his reputation among his acquaintances generally in the community in which he lived, and this appellant was permitted to prove, and did prove, by quite a number of witnesses, including peace officers.

It is also complained that the trial court was guilty of misconduct during the trial in that he permitted the widow of deceased who sat in the courtroom during the taking of testimony, to weep in the presence of the jury, and cry out at appellant, saying: "Flem Stevens, why did you not kill me or my sweet baby, instead of my husband, who died with a smile on his face?" This outbreak on the part of Mrs. Grawbarger was nothing more than an uncontrollable manifestation of her grief, which could not have been anticipated by the court, or the officers of the court, then present. Moreover, it is admitted by counsel that she was quickly required by the court to withdraw from the courtroom. The episode, though ill-timed and improper, was such as frequently occurs, and it could not have been prevented by the court except by an order made at the beginning of the trial refusing the widow the right to enter or remain in the courtroom during its progress, which would have been an unusual, as well as a harsh and unjustifiable, requirement that appellant himself did not care to demand. It does not appear from the record that he or his counsel objected to the conduct or statement of Mrs. Grawbarger, or that they excepted to the

Digitized by Google

court's failure to put an earlier end to the occurrence, and, in the absence of such an objection and exception, this court will not consider the alleged error.

We are also without power to consider appellant's complaint as to the alleged misconduct of the acting commonwealth's attorney in the closing argument to the jury, as it does not appear from the record that the alleged improper statement made by him was objected to at the time, that the court was asked to admonish the jury not to consider it, or that its failure to do so was excepted to by appellant. It was not sufficient to present the matter to the lower court for the first time in the motion and grounds for a new trial.

Appellant's objection to the instructions of the court made at the time they were given require us to consider and pass upon them. Their number and length make it impracticable to copy them in the opinion. Eight of them, though in some respects inaptly expressed, we think substantially correct,, but the one marked "No. 5" we are unable to approve. It is as follows: "The court further instructs the jury that, as a matter of law, the defendant being a peace officer in the town of McHenry at the time of the killing of the deceased, Grawbarger, he had the right to arrest the deceased, if he was drunk or committing a breach of the peace in his presence, without any warrant, and had the right to take deceased before the police judge of the town of McHenry to be dealt with according to law. And if the said Grawbarger, after having been arrested by the defendant, refused to submit to said arrest, or to remain in the defendant Stevens' control, as marshal, then the defendant had the right to use reasonable force to compel said Grawbarger to submit to his authority and to continue in his control.

Digitized by Google

and, if the jury believe from the evidence that the deceased, Grawbarger, refused to continue in the control of the defendant as marshal, and assaulted said marshal, the defendant in this action, the defendant. Stevens, had the right to defend himself from said assault, and to use such force as was reasonably or apparently necessary to repel said assault, but the defendant Stevens had no right, even if assaulted by said Grawbarger, after he had been arrested, to use any more force than was reasonably or apparently necessary to protect himself from great bodily harm or death at the hands of deceased, Grawbarger, or to overcome the force, if any, offered by the said Grawbarger in his resistance of said arrest, or continued control after the arrest. And the court further instructs the jury that the defendant had no right to kill the said Grawbarger in order to retain custody of his person after having arrested him, charged with disorderly conduct or drunkenness, or breach of the peace, except as the said Grawbarger was assaulting the defendant as supposed in these instructions." Under the facts appearing in the record there can be no doubt that appellant had, as a peace officer, the right to arrest deceased without a warrant, as he was both drunk and disorderly in the officer's presence. Appellant's right to take him to the depot and hold him in custody until the police judge could be sent for in order that he might try him for the offense committed in the presence of the officer, or commit him to prison in default of bail until the next day, is also free from doubt. It is the theory of the defense that, after the arrest of deceased, had been properly made by appellant, he forcibly resisted the latter in the attempt to release himself from arrest, that is. from appellant's custody as a peace officer, by assaulting him, and that appellant in the effort to

Digitized by Google

retain him in custody and to protect himself from danger of death or great bodily harm, or what reasonably appeared to him to be such danger, shot and killed him. It was for the jury to determine from the evidence introduced by the appellant in support of this theory whether the killing was or was not justifiable. It is, however, patent that the above instructions confined appellant's right to kill deceased to the single ground of self-defense, which was error. For, though he may not have had any reason to fear death or bodily harm at the hands of deceased, if the latter was attempting to release himself from arrest by forcibly overpowering appellant, the latter had the right to use such force as was reasonably necessary to overcome that being used by deceased to effect his release, even to the extent of shooting and killing the latter, if it reasonably appeared to appellant that that was the only way to prevent his release from his (appellant's) custody, though he would have had no right to shoot deceased if he had gotten away from him and was fleeing to escape.

In the case of Head v. Martin, 85 Ky., 482, 9 Ky. Law Rep., 45, 3 S. W., 622, the single question presented for decision was whether a peace officer, in arresting the defendant in a bastardy warrant, had the right to shoot and kill him while fleeing. In the opinion it is said: "It is attempted to draw a distinction between a case where one is attempting to avoid arrest, and where one is endeavoring to escape after arrest. If, however, the offender is in flight, and is not at the time resisting the officer, then the law is the same, whether he be fleeing to avoid arrest, or to escape from custody. * * * The appellee, Martin, had, in fact, been arrested by the appellant, Head, as deputy sheriff, and was shot by the latter when fleeing from his custody, but the fact that an

Digitized by Google

arrest had been made does not alter the law of the case." After holding that the offense of bastardy is to be regarded as a misdemeanor, and that the statute of this State in respect to arrests does not prescribe how they shall be made, but merely provides that "no unnecessary force or violence shall be used in making the arrest," the opinion proceeds to say: "We, therefore, turn to the common law for guidance. By it an officer in a case of felony may use such force as is necessary to capture the felon, even to killing him when in flight. In the case of a misdemeanor, however, the rule is different. It is his duty to make the arrest. He may summon a posse and may defend himself, if resisted, even to the taking of life, but, when the offender is not resisting, but fleeing, he has no right to kill. Human life is too sacred to admit of a more severe rule. Officers of the law are properly clothed with its sanctity. They represent its majesty, and must be properly protected, but to permit the life of one charged with a mere misdemeanor to be taken when fleeing from the officer would, aside from its inhumanity, be productive of more abuse than good. The law need not go unenforced. The officer can summon his posse, and take the offender. * * * An officer in arresting or preventing an escape for a misdemeanor, may oppose force to force. and sufficient to overcome it, even to the taking of life. If the offender puts the life of the officer in jeopardy, the latter may, se defendendo, slay him, but he must not use any greater force than is necessary for his protection." Roberson's Criminal Law, sections 153, 154; Dilger v. Commonwealth, 88 Ky., 550, 11 Ky. Law Rep., 550, 11 S. W., 651; Doolin v. Commonwealth, 95 Ky., 29, 23 S. W., 663; 15 Ky. Law Rep., 408; Bowman v. Commonwealth, 96 Ky., 8, 27 S. W., 870, 16 Ky. Law Rep., 186; Fleetwood v. Com-

Digitized by Google

monwealth, 80 Ky., 1, 3 Ky. Law Rep., 497; Mockabee v. Commonwealth, 78 Ky., 380. The same doctrine is stated in Bishop on Criminal Law, sections 662, 663, as follows: "The justification of homicide happening in the arrest of persons charged with misdemeanors, or breaches of the peace, is subject to a different rule from that which we have been laying down in respect to cases of felony, for, generally speaking, in misdemeanors it will be murder to kill the party accused for flying from the arrest, though he cannot otherwise be taken, and, though there be a warrant to apprehend him, but under the circumstances, it may only amount to manslaughter, if it appear that death was not intended. * * * But, in misdemeanors and breaches of the peace, as well as in cases of felony, if the officer meet with resistance, and the offender is killed in the struggle, the killing will be justified." The instruction of self-defense given by the lower court, together with the one given below in this opinion, will be sufficient to advise the jury under what circumstances the killing of deceased may be excused, if excusable at all, under the evidence.

The instruction which the court is directed to give, on a retrial of the case, in lieu of No. 5, should be expressed as follows: "The court instructs the jury that, if they believe from the evidence deceased was drunk and disorderly in the presence of appellant, the latter, as marshal of the town of McHenry, had the right to arrest him without a warrant, and to hold him in custody until the presence of the police judge could be secured to make some disposition of the case, and, if they further believe from the evidence that, after the arrest of deceased, and while appellant had him in custody, deceased attempted by force or violence to effect his release from appellant's cus-

Digitized by Google

tody as an officer, appellant had the right to use such force as was necessary or reasonably appeared to him to be necessary, but no more, to overcome the forcible resistance of deceased, and if, under these circumstances, he shot and killed deceased, the killing was excusable, if appellant could not otherwise overcome the forcible resistance of deceased, or it reasonably appeared to him that he could not do so."

On account of the error committed by the trial court in giving instruction No. 5 to the jury, the judgment is reversed, and the case remanded for a new trial consistent with the opinion.

Petition for rehearing by appellee overruled.

CASE 6.—ACTION BY W. C. HOPKINS AND ANOTHER AGAINST S. M. SLUSHER AND ANOTHER, ON AN APPEAL BOND.—Dec. 11.

Slusher, &c. v. Hopkins, &c.

Appeal from Bell Circuit Court.

M. J. Moss, Circuit Court.

Judgment for plaintiffs. Defendants appeal. Affirmed.

1. Appeal Bond—Affirmance on Appeal—Release of Sureties—Bankruptcy of Principal—The sureties on an appeal bond executed to stay proceeding on a judgment in the circuit court until it can be heard and determined in the appellate court, can not be released from liability on the bond on the ground that the principal in the bond has been discharged as a bankrupt after the judgment of the lower court was affirmed in the appellate court.

Digitized by Google

WILLER & POINTS for Appellants.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

In May, 1904, the appellees recovered a judgment in the Bell circuit court against the appellant John Slusher for the sum of about $800. On the 24th day of January, 1905, John Slusher was granted an appeal in this court, and thereupon executed an appeal bond, with S. M. Slusher and W. J. Slusher as sureties. The bond was in the usual form, by which the parties covenanted that John Slusher, would pay to the plaintiffs therein all costs and damages adjudged against him on the appeal, and would satisfy and perform the judgment in the event it was affirmed by the court of appeals. On November 9, 1905, that judgment was affirmed by this court (89 S. W., 244). It appears that on October 27, 1905, the appellant John Slusher filed his petition and application in the United States court for the Eastern District of Kentucky, seeking a judgment discharging him in bankruptcy from all debts and liabilities then existing, including that above mentioned. Such proceedings were had therein, and on January 9, 1906, the court regularly discharged him from all his debts and liabilities. This action was instituted by the appellees against the sureties on the appeal bond above mentioned, and for defense they pleaded the judgment of the United States court discharging their principal in bankruptcy. The lower court disregarded this plea, and rendered judgment against them for the amount due, of which they complain.

In support of their position that they are not liable on the bond, appellants cite the case of Payne & Brother v. Able, &c., 7 Bush, 344, 3 Am. Rep., 316. That case, however, is dissimilar in some respects to

Digitized by Google

the one under consideration. There the discharge in bankruptcy, and the plea setting up that fact, took place before any judgment was rendered in the lower court. Here the action was prosecuted to a judgment in the lower court, and the appeal taken and affirmed by this court, before the principal was discharged in bankruptcy. There is still another substantial difference in the cases. The bond in the case cited was for the release of attached property. The sureties did not agree to pay any particular sum. Here, however, the sureties agreed to pay the judgment that was rendered against their principal if it was affirmed by this court. Section 16 of the present bankruptcy law reads as follows: "The liability of a person who is a co-debtor with, or guarantor, or in any manner a surety for, a bankrupt, shall not be altered by the discharge of such bankrupt." Act July 1, 1898, c. 541, 30 Stat., 550 (U. S. Comp. St., 1901, p. 3428). Collier in his work on Bankruptcy (4th Ed., p 187), in discussing this section, with reference to the release of sureties from liability on appeal bonds, uses this language: "Here, if the law of the State does not permit the discharge to be pleaded in the appellate court, the discharge of the principal does not relieve his surety. If it may be pleaded in such court, no final judgment being possible against the principal, the surety is relieved." Several cases are cited in support of the text. Under our Code there is no authority permitting a pleading of this nature to be filed in the court of appeals. It is certain, however, that no such plea was offered in this court on the appeal; nor could one have been offered, as that case was affirmed before the principal was discharged in bankruptcy.

The case of Knapp et al. v. Anderson et al., 71 N. Y., 466, is similar in many respects to that at bar.

Digitized by Google

In the opinion therein it is said: "The discharge of the appellant in bankruptcy, pending the appeal did not release the sureties upon the appeal bond from their liability. The discharge did not affect the appeal, or stay proceedings upon it, or prevent a judgment therein." In this case the sureties, by the execution of the appeal bond in question, obtained for their principal, John Slusher, a stay of all proceedings for the enforcement of the judgment rendered against him for near 12 months, thus preventing the appellees collecting the same; and, if their contention herein could be sustained, it would result in a great hardship upon the appellees, depriving them of their right to maintain an action now upon the appeal bond for the sole reason that their principal, by his own voluntary act, took advantage of a law which releases him from the payment of the judgment. It would be a strange procedure, indeed, which afforded the appellants, under these circumstances, a means of escape from their liability to the appellees.

As the judgment of the lower court is in accord with our views herein expressed, it is affirmed.

Digitized by Google

CASE 7—ACTION BY W. J. LOUGHRIDGE AGAINST MOSES BURKHART TO RECOVER LAND.—Dec. 11.

Burkhart v. Loughridge

Appeal from Harlan Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Trial—Reception of Evidence—Civ. Code Prac. sec. 606, subsec. 3, provides that no person shall testify for himself in chief after introducing other testimony for himself in chief. Held, that where, in a suit to recover land, defendant claimed title under a title bond alleged to have been executed to I., and plaintiff took the deposition of I., in which he stated that no bond was made to him, and there was no cross-examination of the witness, and thereafter defendant took the deposition of I., in which he stated that a bond was executed to him, though defendant did not obtain leave to cross-examine I., the latter's second deposition should be regarded as a cross-examination, and hence an objection to a subsequent deposition given by defendant was without merit.
2. Evidence—Best and Secondary Evidence—Lost Instrument—In a suit to recover land claimed by plaintiff under a title bond, the testimony of an attorney that plaintiff gave him the bond to keep and have it recorded, and that he did not know where it was, although he had made a thorough search for it, and that there was no intention on his part to misplace it, was sufficient evidence of the loss of the bond to admit parol evidence of its contents.
3. Same—On an issue in an action to recover land as to the authenticity of a lost title bond, evidence considered, and held sufficient to sustain the same.
4. Bona fide Purchases—Without Notice—A purchaser of land at decretal sale can not claim to be a bona fide purchaser without notice, when at the time of the sale an adverse claimant

Digitized by Google

was present with a title bond in his hand forbidding a sale of a part of the tract, and the commissioner then announced that they were selling only the unsold land.

ISHAM G. LEABOW AND H. C. CLAY Attorneys for Appellant.

AUTHORITIES CITED.

1. Purchasers buying with notice of the equitable title of others, not permitted to protect themselves against said equitable claims. (Waits Actions and Defenses, Vol. 3, page 449, citing; Murray v. Brown, 1 Johns Ch., 566; Heatley v. Finster, 2 Johns Ch., 158; Wilcoxen v. Morgan, 2 Col., 473; 1 Story's Eq. Jur., sec. 395.)

2. Information which should put a prudent person on inquiry, sufficient notice. (Currens & Colburn v. Hart, Hardin, 41; Cotten v. Hart, 1 Mar., 58; Nanz v. McPherson, 7 T. B. Mon., 599; Russell v. Petree, 10 B. M., 186; Willis v. Valette, 4 Met., 188-189.)

3. A party having notice sufficient to put him on inquiry cannot become a bona fide purchaser, when knowledge of the truth would render him otherwise. (Wright v. Ross, 36 Col., 437; Pendleton v. Fay, 2 Paige, 205.)

4. It is sufficient notice when the means of knowledge are at hand: and if a party omits to inquire and proceeds to act, he does so at his peril. (Angle v. N. W. L. Ins. Co., 92 U. S., 342; Hawley v. Cramer, 4 Cow., 717; Booth v. Barnum, 9 Conn., 286.)

5. Notice to Agent—Notice to principal. (Williamson v. Brown, 15 N. Y., 354; Miller v. Fraley, 21 Ark., 22; Worden v. Williams, 24 Ill., 67; Jones v. Bamford, 21 Iowa, 217.)

6. Court can convey only title of parties before it. (Campbell v. Mosely, Litt. Sel. Cases, 359.)

7. Proof in Chief and Rebutting proof. (Gibson's Suits in Chancery, sec. 463; Bouvier's Law Dictionary, "Rebutting Evidence.")

8. Court has discretion to allow party recalled as a witness in chief. (Louisville Life Ins. Co. v. Monarch, 99 Ky., 100.)

H. C. HAZELWOOD, H. E. ROSS AND J. G. AND J. S. FORESTER for appellee.

AUTHORITIES CITED.

Burkhart v. Loughridge, 25 Ky. Law Rep., 816; Helton v. Asher, 20 Ky. Law Rep., 936; Gibson's Suit in Chancery, sec. 463; Civil Code, sec. 606, sub-sec. 3.

Digitized by Google

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

W. J. Loughridge and others bought at decretal sale a large body of land as the property of the heirs of William Turner, Sr., who died about the year 1880. Moses Burkhart claimed 100 acres of the land, and Loughridge and his associates brought this action against him to recover it. He set up title to the land under a title bond which he averred that William Turner, Sr., had made to Isaac Ingle of date July 5, 1874, and which he alleged that Ingle had assigned to him. He also alleged that Ingle had paid Turner for the land in his lifetime, but that Turner had failed to make him a deed. The plaintiffs took a rule upon him to file the title bond referred to. He responded that the bond was lost. Issue was made on the loss of the bond, and on the hearing of the rule the court entered a judgment against Burkhart in the action on account of his failure to file the bond. He appealed from that judgment to this court, and on the appeal the judgment was reversed; the cause being remanded for a trial on the merits. Burkhart v. Loughridge, 116 Ky., 604, 76 S. W., 397, 25 Ky. Law Rep., 816. On the return of the case to the circuit court it was transferred to the equity docket and continued for preparation. Before Burkhart had taken any proof in support of his claim to the land under the title bond, the plaintiffs took the deposition of Isaac Ingle at Lexington, Ky.; the defendant not being present in person or by attorney, and there being no cross-examination. In that deposition Ingle stated that he was 65 years old; that he lived near Hagan, Lee county, Va.; that he had formerly lived in Harlan county, Kentucky; that he had bought

Digitized by Google

the 100 acres of land from William Turner, Sr., about the year 1874 verbally, but that Turner had made him no title bond, and that he had not assigned the bond to Moses Burkhart; that he had not had a bond from Turner; that it was only a verbal arrangement; and that he had not paid anything on the land. This deposition was given on January 20, 1905. On February 3, 1905, Burkhart, getting Ingle in Harlan county, took his deposition again, in which he stated that he bought the land of William Turner; that Turner executed to him a bond for title; that he paid Turner for the land; and that he assigned the bond to Burkhart. He also stated that the plaintiffs had given him $30, a pair of shoes, and paid his expenses to go to Lexington and give his deposition; that John McDonald and Thomas Howard went with him to Lexington, and their expenses were also paid. He stated that he was frightened in Lexington, and did not know what he did state there, but that what he had stated in his second deposition was true. At the February term of the Harlan circuit court the case was continued, and no objection was made to the fact that Ingle's deposition had been retaken without leave, or that there had been no leave to cross-examine him. Afterwards, on March 16th, Moses Burkhart gave his deposition, and subsequently took his other proof in the case. At the August term the plaintiffs filed exceptions to the deposition of Moses Burkhart taken on March 16th, 1905, because Burkhart had previously taken the deposition of Isaac Ingle. The circuit court sustained this exception, and excluded the deposition of Moses Burkhart. The result of this was that he had not sufficient evidence to show the loss of the bond, and the circuit court on this ground again entered judgment against him.

Sub-section 3 of Section 606 of the Civil Code of

Digitized by Google

Practice is as follows: "No person shall testify for himself, in chief, in an ordinary action, after introducing other testimony for himself, in chief; nor in an equitable action, after taking other testimony for himself, in chief." This provision does not apply to rebuttal evidence. King v. King, 42 S. W. 347, 19 Ky. Law Rep. 868; Savage v. Bulger, 77 S. W. 717, 25 Ky. Law Rep. 1269. It has also been held that it is a rule of practice, not of right. Barkley v. Bradford, 100 Ky. 304, 18 Ky. Law Rep. 725, 38 S. W. 432. If, before taking the deposition of Isaac Ingle, Burkhart had gotten leave of court to cross-examine Ingle, there would be no doubt that he could subsequently give his own deposition and read his examination of Ingle as Ingle's cross-examination. He did not get leave to cross-examine Ingle, and for this reason an exception to the deposition might have been sustained, if filed, But, if we treat the statements of this deposition as a cross-examination of Ingle, and as only competent to impeach the testimony which Ingle had given at Lexington, we give full force to the letter of the Code, and at the same time do not allow a mere slip of the attorney to defeat a trial on the merits. Under the circumstances, the court would have given leave for Burkhart to cross-examine Ingle, and we see no reason why the second deposition may not be treated as a cross-examination on the first. The way it occurred evidently was that the deposition was taken by an attorney who had not prepared the case, and not by the regular attorney. We therefore conclude that the court should not have sustained the exception to Moses Burkhart's deposition, but should have allowed the second deposition of Ingle only to be considered as rebuttal evidence.

The proof for the defendant tends to show that Ingle is a man of very limited capacity, and in view

Digitized by Google

of his contradictory statements no weight can be given to his testimony on either side. Thomas Howard, who came to Lexington with him, had been the attorney for Burkhart, and is the person to whom Burkhart says he gave the bond, and that he has not since seen it. The testimony of Howard as given in the record in regard to the bond is in these words: "The defendant, Moses Burkhart, gave me this bond to keep, and then got it to have it recorded. I don't recall of ever seeing it since he got it. I have looked for it, and can't find it, have made a thorough search in my office, and have not been able to find it, and have no idea as to where it is. There was no intention on my part to misplace it, and no understanding of any kind that it was to be misplaced, nor was any such thing ever mentioned in my hearing." Under this proof we think there was sufficient evidence of the loss of the bond to admit parol proof of its contents. The bond had been recorded. A copy of the record was produced. So there is no doubt of the terms of the bond.

The only question in this case is as to its authenticity. The bond was witnessed by John Carwood and Jeff Burkhart. A son of John Carwood testifies that his father died in 1889, and that about five years ago the bond was shown to him; that he was familiar with his father's handwriting; that the bond was in his father's handwriting; and that his father's signature to it as a witness was genuine. Jeff Burkhart, the other witness to the bond, testified to being present at its execution; that it was written by John Carwood and witnessed by himself and Carwood. The assignment of the bond from Ingle to Burkhart was made on November 22, 1900, and this was witnessed by Jeff Burkhart and James Dean, who testify to it. So the defendant Burkhart makes out his case without any

Digitized by Google

help from the witness Ingle. He also proved by one witness that Turner told him he had sold 100 acres to Ingle; that Turner had him to help lay off the boundary; that Turner told him that he had made Ingle the bond; and that he knew of Ingle's paying Turner for the land. Several other witnesses testify that this piece of land was known as Ingle's land in the neighborhood after about the year 1874, and state declarations of Turner similar to those the witness referred to.

On the whole evidence, we are forced to the conclusion either that the bond is genuine or that all of these witnesses, who are otherwise unimpeached, are swearing falsely. In addition to this, Ingle is an ignorant man, and can neither read nor write. Jeff Burkhart, the next most prominent man in the transaction, makes his mark, and Moses Burkhart seems to have little education. There is nothing in the record to indicate that these men are the kind of persons to fabricate a paper of this sort, and, while most of the witnesses are akin to Burkhart, some are not, and we cannot reject a witness' testimony when it is not contradicted in any way simply because he is akin to one of the parties to the action. We attach no importance to the supposed variation in the signature of William Turner to the bond, and the testimony of Howard, who recorded the bond, to the effect that the paper looked old, but the writing looked new, is contradicted by that of Carwood, who testified that the paper was in his father's handwriting, and that his father died in 1889, long before this controversy arose. The plaintiffs are not bona fide purchasers without notice. When they bought at the commissioner's sale, Jeff Burkhart was there with the bond in his hand and forbidding the sale of this part of the tract. The commisisoner and the attorney who were conducting

Digitized by Google

the sale then announced that they were selling only the unsold land.

Judgment reversed, and cause remanded for a judgment in favor of appellant.

Justice O'Rear dissenting.

Petition for rehearing by appellee overruled.

CASE 8.—PROSECUTION AGAINST ANDERSON AUSTIN FOR HOMICIDE.—Dec. 11.

Austin v. Commonwealth

Appeal from Allen Circuit Court.

John M. Galloway, Circuit Judge.

Defendant convicted and appeals. Affirmed.

1. Criminal Law—Instructions—Sufficiency—Where the court, on a trial for homicide, correctly charged on the law of self-defense, an instruction that to kill with a deadly weapon in sudden affray or sudden passion without malice "and not in * * * necessary self-defense" was voluntary manslaughter, was not erroneous for failing to state the law of self-defense.
2. Same—Argument of Counsel—A statement of the prosecuting attorney in his argument to the jury on a trial for homicide while warning them of their duty, that the crack of the pistol, the roar of the shotgun and the flash of the dirk had made the state notorious for crime, was not reversible.
3. Same—On a trial for homicide the prosecuting attorney, in his closing argument, stated that accused was under the duty to flee before striking. On objection he withdrew the statement, and said that he meant to say that accused must avoid striking if he could in safety to himself as the situation then reasonably appeared to him. Held that the statement was not prejudicial to accused.
4. Same—Evidence at Former Trial—Method of Proof—Statutes.

Digitized by Google

—Ky. stats. 1903, secs. 4637-4645, authorizing the appointment of an official stenographic reporter who shall take stenographic notes of the testimony, and make a transcript of the same to be used in making a bill of exceptions, and providing that, in a criminal case, the testimony, taken by the reporter, shall be used on a subsequent trial only on the consent of accused, do not change the method of proving the testimony of a deceased witness by bystanders who heard and remembered the testimony of the deceased witness, and do not make the reporter's notes the best evidence.

5. Same—The transcript of the testimony of a deceased witness, testifying at a former trial, may be proved by the official stenographic reporter and read by him as evidence when the reporter testifies that the testimony was taken down accurately and correctly transcribed.

6. Witnesses—Cross-Examination—Testing Memory and Veracity. —In a criminal case the stenographer who took down the testimony of the witnesses at a former trial and who testified as to the testimony given at that trial by a deceased witness was properly cross-examined by being required to read his transcript of the evidence as a means of testing his memory and veracity.

W. C. GOAD Attorney for Appellant.

Our contention is:—

1. The court erred in admitting incompetent evidence.

2. The court failed to properly instruct the jury.

3. Misconduct of Counsel for the Commonwealth in argument to the jury in saying that "the crack of the pistol; the roar of the shotgun, and the gleam of the dagger," is what has brought Kentucky in disrepute abroad, and in saying further that the proof shows the appellant was in a forty acre field at the time of the difficulty and it was his duty to have escaped.

N. B. HAYS, Attorney General, C. H. MORRIS, J. H. GILLIAM and SIMS & GRIDER for appellee.

We submit that unless statements in argument of counsel, excepted to at the time, are clearly calculated to mislead the jury and prejudice the substantial rights of the appellant the case should not be reversed therefor.

Digitized by Google

OPINION OF THE COURT BY JUDGE O'REAR—Affirming.

The judgment of conviction of appellant was reversed on a former appeal because the trial court failed to properly instruct the jury as to the law of self-defense. 91 S. W. 267, 28 Ky. Law Rep. 1087. On a retrial of the case the instruction indicated in the opinion as proper was given. The appellant was again convicted. On this appeal it is insisted that the effect of the self-defense instruction was nullified by a failure to properly state in the manslaughter instruction (under which defendant was found guilty) that one's right to act in his self-defense was not properly set out in that instruction, also, in that it did not allude to the right of the accused to act on appearances. The court, in that instruction, told the jury that to strike and kill with a deadly weapon, in sudden affray, or sudden heat and passion, without malice, "and not in his necessary self-defense," was voluntary manslaughter. It is insisted that the whole law of self-defense should have been stated there. But we think the instruction was sufficient in defining voluntary manslaughter. That is what the court was there defining. As to what would constitutte "in his necessary self-defense" was correctly set out in the instruction defining the defense. Instructions are intended to be read all together. Each one qualifies or limits all the others. They are intended to be, and are necessarily, so understood in their application. And when each instruction is correct within itself, and and all are consistent as a whole, and give all the law applicable to the case, the practice cannot be deemed prejudicial to the defendant because the same ideas might have been better expressed.

In the closing arguments to the jury, attorneys

Digitized by Google

representing the commonwealth are charged with having abused their privilege, and indulged in unwarranted statements to the jury. One of them was the statement that the crack of the pistol, the roar of the shotgun, and the flash of the dirk have made the State notorious for crime. The attorney was evidently warning the jury of their duty as part of the machinery of the law for the punishment of crime, that personal violence resulting in innumerable deplorable tragedies, the history of which was well known, was due to the lax administration of the law, and that all such could best be deterred by a prompt and stern enforcement of the law against homicide in each case by the jury trying it. We do not think the line of argument was objectionable. The county attorney in his closing argument, in commenting upon the defendant's right to strike if he could not reasonably and safely avoid it, told the jury that the defendant was under the duty to flee before striking. But upon objection, he withdrew the statement, and said that he meant to say that the accused must avoid striking, if he could in safety to himself as the situation then reasonably appeared to him. Instead of the incident's being hurtful to the defendant, it appears to us that it sharply accentuated the real right of the defendant, and excluded the necessity of flight—a view which might have been mistakenly taken unless thus warned. We cannot see how the occurrence could possibly have prejudiced the rights of the accused.

A witness who testified for the commonwealth at the first trial—and the only eye-witness to the killing (except defendant) who saw the whole difficulty—has died. On the next trial the commonwealth was allowed to prove by bystanders the testimony of the deceased witness on the other trial. It is admitted that the testimony given by a witness since deceased,

Digitized by Google

given when the accused was confronted by him and had the opportunity of cross-examining him, may be proved on another trial of the same matter between the same parties. 2 Roberson's Criminal Law, 1077; Kean v. Commonwealth, 10 Bush 190, 19 Am. Rep. 63; Fuqua v. Commonwealth, 118 Ky. 578, 26 Ky. Law Rep. 420, 81 S. W. 923. In the instant case, the evidence was adduced by the introduction of the stenographer who took the notes at the former trial, and by another who heard the testimony given at the former trial. Each of the witnesses duly qualified themselves. The objection is that as the testimony of the deceased witness was taken down by the court's official stenographic reporter under the order of the court in the case, and had been transcribed as required by the statute, and was then on file in the record, that the stenographer's notes were the best evidence of what the witness had said, and was thereupon receivable first to prove the fact. And it is insisted that the stenographer's bill of evidence being in existence and a part of the record, precluded a resort to any other method of proving the testimony of the deceased witness. It is beyond question that the testimony of the deceased witness was relevant on this trial. The ordinary method indeed, the method of proving it under the practice in this State, was to introduce some person who heard it when given by the witness, and who remembered it, or remembered the substance of it. Kear v. Commonwealth, supra. Unless the statute relating to official court stenographers has changed the practice, the same rule must still prevail. Chapter 121, Ky. St., 1903 (being the act of July 13, 1893), and comprising sections 4637 to 4645, Ky. Stats., 1903, contains the law regulating the appointment of official stenographic reporters, their duties, compensation and purposes for which their notes may be used.

Digitized by Google

The primary object of such notes is to make them, when extended and signed by the presiding judge and stenographer, a part of the bill of exceptions to be used on an appeal of the case. They take the place of the witnesses' statements otherwise set out in the bill of exceptions. But section 4643, Ky. St. 1903, makes the evidence so taken a part of the record of the case in which it is taken for certain other purposes. It allows it, in the discretion of the trial judge, to be used in any subsequent trial of the same case between the same parties, when the testimony of the witness cannot be procured; but it is expressly provided "that in criminal cases such testimony shall be so used only upon the consent of the defendant." There is no provision of the statute that makes the stenographer's "bill of evidence," as it is sometimes called, the best evidence of what the witnesses may have deposed, so that it will exclude all other evidence on the subject. Least of all is there room for the contention that it is made so in the trial of criminal cases.

In the case of Fuqua, supra, it was said: "As the stenographer, if familiar with the testimony given by Davis at the previous trial, might, from mere recollection, have detailed it to the jury, we know of no reason why he should not have been permitted to read it from the transcript made from the stenographer's notes taken by him at the time Davis testified. Manifestly it was and is more accurate than the memory of any human witness who may have heard Davis testify." This statement of the court is seized upon as declaring that the stenographer's bill is the best evidence of what the witnesses said on the former trial. But it does not. It deals alone with the weight or credibility of the evidence, and not at all with its grade. In law "best evidence" is a technical term. It does not necessarily mean that which is most credi-

Digitized by Google

ble, though generally it is supposed to refer to that fact. By the rule requiring the introduction of the best evidence is meant that no evidence shall be received which is merely substitutionary in its nature, so long as the original evidence can be had. Greenleaf says (1 Greenleaf, Ev. section 82): "The rule excludes only that evidence which itself indicates the existence of more original sources of information." As to what is the best evidence is therefore always a matter for the court alone to decide. But as to the weight to be given any evidence, it is for the jury to say. For example, the best evidence of the contents of a letter would be the letter itself, but if that is lost, then secondary evidence as to its contents is receivable; in such case a letterpress copy is classed as secondary evidence of the contents of the original. But the parties would not be confined to that; they could introduce the testimony of witnesses who had seen and read the original. It would be for the court to say whether the facts showed the loss of the original so as to admit the secondary evidence; but the jury would have to determine its weight. They probably would believe the letterpress copy before the memory of a witness who contradicted it. But whether so or not, both the letterpress copy and the testimony of the witnesses would be allowed to go to them. So a photograph of an object is relevant when proof of the existence and condition of the object is a thing to be proven. But the photograph is not deemed the best evidence, in the technical sense, so that the testimony of eye-witnesses would be excluded by it.

If the stenographer could remember the testimony of the witness where such testimony is receivable in evidence, in the same or in another trial, he would be competent as a witness to testify concerning it. If he had recourse to his shorthand, or to his extended

Digitized by Google

notes, to refresh or aid his memory, it would be allowable, of course. And if he could only say that he took the notes in shorthand, and took them correctly, and had them transcribed correctly, testifying that his transcript was correct, he might read the transcript as his recollection of the testimony. Just as a book-keeper is allowed to read his book entries, and just as a photographer would be permitted to testify as to the appearance of the object in dispute. The fact he had taken a photograph of it would not render incompetent his parol description of it, although he might refer to his photograph as being its true and accurate picture. We think the stenographer's bill may be proved and read by him as evidence of what a deceased witness may have testified on a former trial, when that fact may be proved, provided he testifies that it was taken down accurately by him at the trial, and is correctly transcribed. But other evidence, that of any other competent witness who heard and remembers the substance of the deceased witness' testimony, is also receivable in the case to substantiate or to rebut the fact that the said deceased witness did so testify. In this case the accused had the stenographer, on her cross-examination, to read her transcript of the evidence. This was also properly admitted for the reasons given above, as well as furnishing a test of the stenographer's memory and veracity.

We perceive no error in the record, and the judgment is affirmed.

Digitized by Google

CASE 9.—ACTION BY J. B. SMITH AGAINST JONATHAN CORNETT TO RECOVER LAND.—Dec. 11.

Smith v. Cornett

Appeal from Harlan Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

1. Land—Infants—Sale by Father—Void Unless Ratified—A sale of the land of an infant by her father is not binding on the infant unless ratified by her after she becomes 21 years of age.
2. Same—Purchaser of Infant's Land—Void Sale—Adverse Possession—Married Woman—Limitation—Where a father in 1869 sold the land of his infant daughter, who was born in 1857. and married in 1874, the sale being void, —the possession of the purchaser did not become adverse until she became of age in 1878, and she being then a married woman, the statute of limitation did not run against her.
3. Same—Champerty—One who is in possession of land as a purchaser from an infant does not hold adversely to the infant within the meaning of the champerty statute, and his possession does not render void a conveyance made by the infant to another after arriving at age.

J. G. AND J. S. FORESTER AND H. C. CLAY, for Appellant.

AUTHORITIES CITED.

Ky. Statutes section 2506; Pope, &c. v. Brassfield, 22 R. page 1613; Spriggs v. Alvin, 6th J. J. Marshal, 162-3; Myers v. Buford, 7th J. J. Marshal, 250; Beal v. Brooks, 7th J. J. Marshal 232; Henderson v. Dupree, 82nd Ky. Law Rep., 678; Ross v. Veach, 22nd R., 578; Taylor v. Combs, 20 R., 1829-30; Creech v. Abner, 20 R., 1812.)

Digitized by Google

W. F. HALL AND GREENE & VANWINKLE for Appellee.

AUTHORITIES CITED.

Neither infancy coverture nor any other disability can save the right to bring an action for real property after 30 years from the time the right of action first accrued. (Kentucky Statutes, section 2508; Medlock &c. v. Suter &c., 80 Ky., 101; Bradley v. Burgess, 87 Ky., 648; Stillwell, &c. v. Leavy, &c., 84 Ky., 379; Hawes v. Kirk, &c., 18 R., 215; L. & N. R. R. Co., v. Thompson, 105 Ky., 190; Rose &c. v. Ware, 24 R., 2325-2326; Rose &c. v. Ware, 25 R., 947.) (Pet. for rehearing overruled.)

2. Appellee was in actual adverse possession of the land when appellant took his deed from Emily Hoskins, &c., therefore the sale and conveyance was champertous and void. (Kentucky Statutes, section 210; Adkins &c., v. Whalin, 87 Ky., 153. In point.)

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

John H. Smith died a resident of Harlan County in the year 1862, the owner of 500 or 600 acres of land on Poor Fork. He had eight children, seven of whom survived him. One daughter, Stacy Short, the wife of John B. Short, died shortly before his death, leaving an infant child, Emily Short. Jonathan Cornett, who had married one of his daughters, after his death qualified as his administrator, and moved into the dwelling house where he had lived. Cornett bought out six of the children and received deeds from them for their interest in the tract of land. He also made a trade with John B. Short for the interest which belonged to his infant daughter Emily, who was at the death of her grandfather five or six years old. On October 27, 1869, John B. Short executed to Cornett the following writing: "This is to show that Jonathan Cornett, administrator of John H. Smith, deceased, has settled with me in full as guardian of Emily Jane Short, my daughter, in full of all the

Digitized by Google

interest she, the said Emily Jane, had in the estate of said John H. Smith, Sr., the said John H. Smith being the grandfather of said Emily Jane, both real and personal and said Jonathan Cornett is hereby fully discharged from any liability to me or my daughter. Given under my hand this 27th day of October, 1869." Cornett remained in possession of the land, and when, some years later, Emily married Jeff Hoskins, her husband had an interview with Cornett in the presence of her father, in which the father stated that he had sold her interest in the land to Cornett, and that she was to make him a deed when she became of age, but no deed was made. John B. Short died about the year 1886. In the fall of 1902 Cornett applied to Emily and her husband to make him a deed for her interest in the land, but only agreed to give her $50 to make it. She declined to accept this, and sold her interest in the land to J. B. Smith for $650. Smith thereupon filed this suit against Cornett for a partition of the land. Cornett pleaded limitation and also relied on the statute against champerty. The circuit court dismissed Smith's petition and he appeals.

Cornett testified that John B. Short was appointed guardian of his daughter, but no record of the appointment is produced. Hoskins testified that he was not appointed, or that there was nothing on the record to show that he was. Cornett also testified that he paid Short $130 for Emily's interest in the land, and that Short gave him a title bond, but the bond was not produced, nor is its loss satisfactorily shown. There is no evidence in the record as to what was done with the $130 which Cornett testifies to paying Short. In view of all the facts in the record, we think it may be concluded that Short simply acted as the natural guardian of his daughter in the transaction referred to. He is now dead, and it is a wise

Digitized by Google

rule that a party cannot testify for himself as to a transaction with one who is dead. No ratification of the acts of Short is shown by the record, and the questions to be decided are whether the action is barred by limitation and whether Smith's purchase was champertous; for the infant was not bound by the acts of her father in selling her land, and before she became of age she was married and could only dispose of her land by deed executed pursuant to the statute.

As to the matter of limitation, in Pope v. Brassfield, 110 Ky. 137, 22 Ky. Law Rep. 1613, 61 S. W. 5, on precisely the same facts, we said: "Though the infant Mary E. Pope, now Mrs. Bain, was not married when the bond was given and appellees entered upon the land, they entered under a contract that she would convey, and this obligation was not broken until she became of age. The possession of appellees was not, therefore, adverse to her until she was of age. Before she became of age she married, and when she did not convey after her majority, and the possession of appellees became adverse, she was a married woman, and the statute did not run against her." Mrs. Hoskins was born in 1857. She was married in 1874. Cornett, according to his own evidence, evidently held the land under the voidable purchase from her father, expecting her to make a deed when she became of age, and his possession was not adverse to her until she was of age. When she became of age and his possession did become adverse in 1878, she being a married woman, the statute did not run against her. Ky. St. 1903, section 2506. And 30 years had not elapsed when the action was brought and so the 30-year statute has no application. Ky. St. 1903, section 2508. She remained under the disability of coverture at the time the action was brought. We therefore

Digitized by Google

conclude that the action is not barred by limitation.

As to the deed to Smith being champertous, the rule is that one who is in possession of land as a purchaser from an infant does not hold adversely to the infant within the meaning of the champerty statute, and his possession does not render void a conveyance by the infant to another after he arrives at age. Moore v. Baker, 92 Ky. 518, 13 Ky. Law Rep. 724, 18 S. W. 363; Baley v. Deakins, 5 B. Mon. 161.

Judgment reversed, and cause remanded for a judgment as herein indicated.

CASE 10.—ACTION BY J. K. SUMRALL AGAINST P. MANINNI TO ESTABLISH HIS USE TO AN ALLEY WAY.—Dec. 11.

124 67
f132 304

Sumrall v. Maninni

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Affirmed.

1. Easement—Alley—Plea—Res Judicata—Where, in an action by one claiming an easement in an alley way adjoining his land, the defendant pleaded a judgment in a former action between the parties in which the plaintiff in this action then claimed to be the owner of the alley, and denied that the defendant had any right or title thereto, and which judgment declared the defendant the owner of the alley and enjoining the plaintiff from using it, said judgment is res judicata, and a bar to plaintiff's right of recovery.

Digitized by Google

J. T. WILSON, W. LAWSON SUMRALL, J. K. SUMRALL AND SUMRALL & SUMRALL for Appellant.

E. V. PURYEAR AND GREENE & VANWINKLE for Appellee. A. C. VANWINKLE, guardian ad litem for Infant Defendant.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This action was instituted by appellant in the court below to establish his right to the use of an alley in the rear of a building owned by him in the city of Danville, which alley is upon, and extends to the back end of, an adjoining lot owned by appellee. It is admitted in the petition that appellee holds the legal title to the alley in question, but averred that his title is subservient to appellant's right to an easement therein of light and air for his building, and passage to and from the rear thereof, and that appellee, by erecting a plank fence at the west side of the alley and in close proximity to the wall of the rear of appellant's building, not only deprived him of the use of the alley as a passway, but also of light and ventiation for that part of his building from which a door opens on an alley, and two windows are set above it. Appellant bases his right to the easement claimed upon the alleged ground that it was by implication granted him by his remote vendor, one Sneed, who owned both his lot and that of appellee, together with a third lot lying west of appellant's on which there was a livery stable; that Sneed erected the building on appellant's lot which he used as a lodging house in connection with a hotel he conducted on the lot now owned by appellee; that the alley was opened and maintained by Sneed for the use of the hotel, the occupants of the building on appellant's lot, and the livery stable; and that when Sneed, more than 30 years ago, sold and conveyed the lot now owned by

Digitized by Google

appellant to Mrs. O. Smith, from whom and through several intermediate purchasers and conveyances the title thereto finally passed to appellant, the easement in question, being appurtenant to the freehold, by these several conveyances passed with the title; and that by reason thereof, and its alleged enjoyment by appellant and his vendors for more than 30 years. his right thereto cannot be questioned by appellee. The answer contains a traverse, and in addition avers that in 1895 appellee, by suit against appellant in the Boyle circuit court, charged him with trespassing upon the alley in controversy by using it as a passway, and commencing to erect to and on his rear wall a balcony which, when completed, would overhang and obstruct the alley; that it was further averred in the petition in that case that appellee was the sole owner of the alley, and entitled to the exclusive use thereof, and that appellant's acts of trespass and obstruction of the alley complained of were unlawful and in violation of appellee's rights, for which reason an injunction was asked to prevent the completion of the balcony, and to restrain appellant and his tenants from passing over or using the alley in question; that the answer filed by appellant in that action denied that appellee had any title to the alley, also denied his right to use it and averred, in substance, that it was owned by him and was in his (appellant's) possession, and that he alone held the title thereto and was entitled to the possession thereof; that upon the issues thus made by the pleadings, the parties took proof, and, following a submission of the case, judgment was rendered in 1899 by the circuit court in appellee's favor, declaring him the owner of the alley and entitled to the exclusive use thereof, and enjoining appellant from using the alley, or building a balcony over same. The answer in the case at bar contains

Digitized by Google

the further averment that an appeal from the judgment in the former action was taken by appellant, and upon that appeal the judgment of the lower court was affirmed by this court. The answer also pleaded the judgment thus recovered by appellee in the circuit court, and later affirmed by this court, as a bar to this action. Appellant filed a reply which, in effect, admits the bringing of the former action and the result thereof, but avers that the judgment therein rendered only determined the question of title to the alley in appellee's favor, and denies that it constitutes a bar to his claim of an easement asserted in this case. A demurrer was sustained to the reply by the lower court, and the action dismissed. By this appeal, the appellant seeks the reversal of that judgment.

It is unnecessary to lay aside the plea of res judicata in order to decide whether, upon proof of the facts alleged in the petition, appellant would, as an original proposition, be entitled to the relief prayed. In our opinion the defense of res judicata must prevail in this case. In other words, the judgment in the former action is a bar to the appellant's claim here attempted to be asserted. It appears from the opinion of this court, delivered on the appeal from the judgment in the former action (see Sumrall v. Maninni, 64 S. W. 735, 23 Ky. Law Rep. 1060), that there was more than the question of title involved. It also involved the question of possession as well as title. As in part said in the opinion: "Appellee filed his action to compel Sumrall to remove a balcony he had caused to be built about 12 feet from the ground over a part of this strip (alley) and to enjoin him from trespassing on or using the strip in any way. The defendant pleaded that the strip was his, denying appellee's title, and alleged that it was in the actual adverse possession of appellant at the time the con-

Digitized by Google

veyance was made to appellee, and that his purchase was champertous * * * The action is not in the nature of an ejectment suit. * * *" "An easement is the right in an owner of one parcel of land, by reason of such ownership, to use the land of another for a special purpose not inconsistent with a general property in the owner." 2 Washburn, Real Property, 299; 3 Kent's Com., 419. The enjoyment of an easement requires the use of the land in which the easement exists, and to use is to possess. An easement, therefore, involves possession, though the title and broader right of possession may be in another. In a technical sense, the claim of an easement in property admits title in another, but asserts in the claimant such right of possession as may be necessary to the enjoyment of the easement. It does not lie in the mouth of appellant to say that the possession of the alley was not involved in the former action as well as the title. But if, as contended by him, he could not in that action have claimed title to, and an easement in, the alley at the same time, that fact would not make the judgment in that case any less a bar to this action. If these claims are inconsistent and appellant's defense in the former action did not, in fact, include the claim of an easement, he should not now be allowed to assert such a claim. Having abandoned his right to the easement when it should have been asserted, and rested his right to the alley upon the question of title, or claim of actual adverse possession, and lost on both grounds, it would be manifestly unjust to allow him to subject appellee to the annoyance and expense of another action that he (appellant) may litigate a matter or right upon which he could and ought to have relied in the first action. Such a splitting of causes of action, or matters of defense, should not be tolerated. On this subject we are told

Digitized by Google

by Mr. Freeman, in his work on Judgments, section 249, Title—Extent of the Estoppel: "There is no doubt that a judgment or decree necessarily affirming the existence of any fact is conclusive upon the parties or their privies whenever the existence of the fact is again in issue between them, not only when the subject-matter is the same, but, when the point comes incidentally in question in relation to a different matter in the same or any other court, except on appeal, writ of error, or other proceeding provided for its revision. * * * The judgments of appellee courts are as conclusive as those of any other court. They not only establish facts, but also settle the law so that the law as decided upon any appeal must be applied in all the subsequent stages of the cause. * * * An adjudication is final and conclusive, not only as to a matter actually determined, but as to every other matter which the parties might have litigated and have had decided as incident to, or essentially connected with, the subject-matter of the litigation, and every matter coming within the legitimate purview of the original action, both as to the matters of claim and defense." McDaniel v. Stum, 65 S. W. 800, 23 Ky. Law Rep. 1935; Bement v. Ohio Valley B. & T. Co., 99 Ky. 115, 16 Ky. Law Rep. 676, 35 S. W., 139, 59 Am. St. Rep. 445; Holtheide v. Smith's Guardian, etc., 84 S. W. 321, 27 Ky. Law Rep. 60.

As the lower court did not err in sustaining the appellee's plea of res judicata, the judgment is affirmed.

Digitized by Google

CASE II—CONTESTED ELECTION PROCEEDING BY H. T. CRAWFORD AGAINST E. C. DUFF FOR THE OFFICE OF COUNTY JUDGE.—December 12.

124 73
125 778

Duff v. Crawford

Appeal from Perry Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Elections—Ballots—Certificate of Officers.—Ballots inclosed in sealed envelopes, marked "rejected," and returned by election officers, should not be counted, in the absence of a compliance with Ky. Stats., 1903, Sec. 1482, requiring a certificate or statement signed by the election officers as to whether they had or had not been counted, and, if counted, what part, and for whom.
2. Same—Illegal Votes—Purging Ballot.—The entire vote of a precinct wherein it was claimed illegal voting by illiterates took place should not be rejected, where the complaining candidate did not undertake to purge the ballot of these votes by showing for whom they voted, either by the election officers who saw the persons voting or by the illegal voters themselves, who could be compelled to testify for whom they voted.
3. Same—Registration of Voters—Votes of Persons Not Registered.—The casting and counting of a number of votes greater than the number of registered voters in a precinct embracing territory not within the limits of a town or city was not illegal, since the registration law applies only to voters residing in a city or town.

BAILEY P. MORTON, T. H. HOWARD, WOOTTON & MORGAN, GREENE & VANWINKLE, J. J. C. BACH AND W. C. EVERSOLE for Appellant.

Digitized by Google

QUESTIONS PRESENTED.

1. Were the votes returned, sealed in the envelope by the election officers of Leatherwood, Troublesome and Mason's Creek Precincts, accompanied "with a true statement as to whether they had or had not been counted, and if counted what part and for whom," as required by section 1482; and if not, had the Court below the right to open and count such ballots?

2. Were there such irregularities indulged in, and permitted, by the officers of the election at Carrs Fork and Forked Mouth, as to render the election at those precincts void, and as would justify the Court in casting out and totally disregarding the vote at those places?

AUTHORITIES CITED.

As to questioned ballots: Kentucky Statutes, 1482, 1486, 1488, 1502; 70 S. W., 852; 100 Ky., 319; 47 S. W., 867. As to using ballots as evidence: Kentucky Statutes, Sec. 1585, subsection, 13; 82 S. W., 1013; 70 S. W., 852; 81 S. W., 682; 68 S. W., 867. As to casting out precincts: 70 S. W., 638; 48 S. W., 149; 50 S. W., 538; 35 S. W., 543; 68 S. W., 1076. Acts of General Assembly 1904, amending Sec. 1486 and 1488 Ky. Stats.

E. E. HOGG, JOHN C. EVERSOLE, F. J. EVERSOLE, J. J. FITZPATRICK, for Appellee.

POINTS AND CITATIONS.

1. The formal certificate prescribed by Section 1482, Ky. Stat., is virtually complied with in the spirit and meaning of the law when words are used leaving no doubt as to what the officers of the election did with the ballots.

2. Under the evidence in this case as to the preservation of the ballots and the security of the ballot boxes, the trial court should have re-counted and re-canvassed at the instance of the appellee, the entire vote of the Leatherwood precinct, Bowling precinct, and Lost Creek precinct.

3. The voters should not be disfranchised or their votes not counted when they have voted legally because of some technical neglect of the election officers to do their prescribed duty.

CITATIONS.

Edwards v. Long, 24 L. R., 1106; Bailey v. Hurst, 24 K. L. R.,

Digitized by Google

504; Struss v. Johnson, 100 Ky., 319; McCreary on Elections, page 172-5, section 228; McCreary on Elections, sections 160-161-, P. 125; Naper v. Cornett, 24 K. L. R., P., 576; Wilkes v. Duffy, 24 K. L. R., P. 913; Hurst v. Skidmore, 24 K. L. R., P. 526; Holland v. Center, 19 K. L. R., 1124.

The case of Struss v. Johnson, 100 Ky., discussed and distinguished so also the case of Edwards v. Logan, 24 R.

WILLIAM CROMWELL for Appellee.

POINTS AND AUTHORITIES CITED.

1. Proper method of marking ballots of illiterates. Kentucky Statutes, Section 1475.

2. Ballot marked by an election officer in a booth is an illegal vote. Kentucky Statutes, section 1474. Major v. Barker, 18 K. L. R., 106; Patrick v. Runyon, 20 K. L. R., 1914.

3. Law requiring unvoted ballots to be burned before opening ballot box is mandatory. Kentucky Statutes, Edition 1903, section 1482a; Kentucky Statutes, Edition 1899, section 1482.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

The parties to this litigation were contending candidates for the office of county judge of Perry county at the regular election in 1905. On the face of the returns appellant, who was contestee, received 735 votes and appellee, who was contestant, received 727 votes, being a majority of 8 votes in favor of appellant, and he was given the certificate of election by the board of election commissioners. The appellee contested his election, and upon a trial of the case the circuit court found that appellee received 792 votes and the appellant 763 votes, and adjudged that appellee was elected by a majority of 29 votes.

It is contended for appellant that the court erred in counting for appellee the questioned ballots in Leatherwood, Troublesome, and Mason Creek precincts, and in refusing to throw out Carr's Fork,

Digitized by Google

Forked Mouth, Hazard precinct No. 4, and Hazard precinct No. 10, that gave substantial majorities for appellee, on the ground that gross frauds and irregularities were practiced in these precincts. In Leatherwood, Troublesome and Mason's Creek precincts the election officers returned a number of ballots, inclosed in sealed envelopes and marked "Rejected;" but there was no certificate or statement, signed by the election officers, as to whether they had or had not been counted, and, if counted, what part, and for whom, as required by section 1482 of the Kentucky Statutes of 1903. The circuit court counted these rejected ballots, and found that, in addition to the votes returned by the election officers, appellee was entitled to 2 votes and appellant to 13 votes in Mason's Creek; in Troublesome precinct that appellee was entitled to 5 votes and appellant to 2 votes; and that appellant was entitled to 13 votes in Leatherwood precinct and appellee to 58 votes—counting for appellee 65 votes of the rejected ballots, and for appellant 28. Under the authority of Neely v. Rice, 29 R. 1142, 123 Ky. 806, 97 S. W. 737, in which the opinion was delivered in November, 1906, none of the rejected ballots from these precincts should have been counted for either candidate, because the election officers failed to comply with the requirements of section 1482 of the Kentucky Statutes of 1903 as above set out.

Rejecting these ballots, the result would be the same as that certified by the election commissioners, if no changes were made in other precincts; but the ballot boxes in all the disputed precincts were brought before this court and the ballots recounted, and it appears that in Bowling precinct the election officers certified that appellant had received 110 votes and appellee 72 votes, when the ballots show that appel-

Digitized by Google

lant received 88 votes and appellee 87—the recount of this precinct making a difference of 37 votes in favor of appellee, as appellant only received 1 majority, when the election returns gave him 38. In Lost Creek precinct the election officers returned that appellant had received 65 votes and appellee 35 votes, making a majority for appellant of 30 votes; whereas the recount of the ballots show that appellant received 57 votes and appellee 35 votes, appellant's majority being 22, in place of 30. In Mason's Creek precinct the election returns gave appellant 88 and appellee 55 votes. A recount of the ballots shows that appellant received 91 votes in this precinct and appellee 54 votes, making a gain for appellant of 4 votes. To recapitulate:

The election returns gave to appellant....735 votes
To this should be added in Mason's Creek.. 4 votes

Making a total of.....739 votes
From this must be deducted:
In Bowling precinct.....37 votes
In Lost Creek precinct ..... 8 votes— 45 votes

Leaving appellant's total .....694 votes

As appellee on the face of the returns received 727 votes, his majority was 33 votes.

At Forked Mouth and Carr's Fork precincts a large number of illiterates voted in violation of the law, and in these precincts appellee received a substantial majority; but the record fails to show for whom the illiterates voted, and therefore the returns cannot be purged of their votes. The law is well settled that, where illegal votes are cast and counted, the candidate who undertakes to purge the ballots of these votes must show for whom they voted, and this can be done by the evidence of the officers of election

Digitized by Google

who saw the persons vote, or, if need be, by the evidence of the voters themselves voting openly and illegally, who may be compelled to testify for whom they voted; and, where the party undertaking to purge the ballots fails to adopt this method, the entire vote of the precinct will not be rejected for any irregularity of this character. Napier v. Cornett, 68 S. W. 1076, 24 Ky. Law Rep. 576; Preston v. Price, 85 S. W. 1183, 27 Ky. Law Rep. 588; Browning v. Lovett, 94 S. W. 661, 29 Ky. Law Rep. 692. We do not feel authorized to reject the entire vote of these precincts because of the irregularities practiced, and therefore the vote in these precincts must stand as returned by the election officers.

The record shows that the town of Hazard has two voting precincts, known as "Hazard Precinct No. 4" and "Hazard Precinct No. 10." There were only 23 registered voters in Hazard precinct No. 4, and 70 registered voters in Hazard precinct No. 10, while there was cast and counted in each of these precincts a greater number of votes than those registered; but it appears that these precincts embraced territory not within the town of Hazard, and, as the registration law applies only to voters residing in a city or town, those voters who lived outside the corporate limits of the town had the right to vote without being registered, and this fact accounts for the discrepancy between the registered vote and the vote cast.

Irregularities were practiced in other precincts—in fact, in a majority of them—by both parties; but they are not sufficient to affect the result.

Upon the whole case, we conclude that appellee was fairly elected, and the judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 12.—ACTION BY MAUD HUDGINS AGAINST THE LOUISVILLE RAILWAY CO. FOR DAMAGES FOR PERSONAL INJURIES.—December 12.

124 79
f135 483
124 79
f138 194

Louisville Railway Company v. Hudgins

Appeal from Jefferson Circuit Court, C. P. Branch (1st Div.).

EMMET FIELD, Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Carriers—Injuries to Passenger Alighting from Car.—When a street car has been stopped at the usual place for discharging passengers, it is the duty of the operatives of an approaching car on a parallel track to have it under such control that it may be stopped at a moment's notice so that persons who have alighted may cross the track in safety.
2. Same—Contributory Negligence.—Though one who alighted from a street car and walked around behind the same to cross a parallel track failed to exercise ordinary care to avoid a car approaching on the other track from behind the car from which she alighted, whereby she was injured, the company was liable, if the operatives of the approaching car could, by ordinary care, have discovered her peril and prevented injury to her.

FAIRLEIGH, STRAUS & FAIRLEIGH, FOCHT & FIELD AND GREENE & VANWINKLE for Appellant.

POINTS AND AUTHORITIES.

The second instruction given by the lower court is erroneous because the same qualified the Appellee's contributory negligence; (Louisville Railway Co., v. Colston, 79 S. W., 243, 25 Ky. Law Rep., 1933; Trauber v. Third Avenue Railway Co., 80 N.

Digitized by Google

Y., Supp. 231; Rider Admx., v. Syracuse Rapid Transit Railway Co., 58 L. R. A. 125, 171, N. Y., 139.)

CHESLEY H. SEARCY for Appellee

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

The appellee, a passenger on one of the appellant's cars going west, got off at Twenty-second street and Portland avenue, on the north side of the street, and after alighting, passed behind the car for the purpose of going to the south side. As she was crossing the south track a car on this track going east struck and seriously injured her. From a judgment and verdict in her favor, this appeal is prosecuted.

The negligence complained of as stated in the petition is that the east-bound car was running at a high and dangerous rate of speed, and, without warning to appellee, ran into and against her, and that her injuries were caused by the carelessness and negligence of appellant, its servants, and agents, in failing to give warning of the approach of the car to the crossing, and in operating and managing the car in a careless and negligent manner.

The chief, and in fact only, ground of complaint is alleged error of the court in the qualification of discovered peril added to instruction No. 2, which reads as follows: "It was the duty of the plaintiff when she started across the tracks of the defendant at the place mentioned in the petition to exercise ordinary care for her own safety, and, if you shall believe from the evidence that at that time she failed to exercise ordinary care for her own safety, and, by reason of such failure, she helped to cause or bring about the injury of which she complains and that she would not have been injured but for her failure in that respect,

Digitized by Google

if any there was, then the law is for the defendant, and you should so find, unless you shall believe from the evidence that the employes of the defendant on its east-bound car could have seen the plaintiff by the exercise of ordinary care when she came in peril from the car, and, by the exercise of ordinary care, could have prevented the injury which the plaintiff alleges she sustained; if they could, then the law is for the plaintiff, and you should so find." To understand the pertinency of the objection to this instruction it will be necessary to state the substance of the evidence. There are two street car tracks at Twenty-second street and Portland avenue. These tracks are 4 feet 6 inches apart, and, when the cars on each track are opposite to each other, there is a space of about two feet between them. The west-bound cars occupy the north track, and cars going east the south track. The car from which appellee alighted stopped at the usual place for the purpose of allowing her to alight. She got off of the rear platform on the north side of the car, and, as her home was on the south side of the street, she immediately turned and walked behind the car for the purpose of crossing the street, and, in doing so, stepped on the east-bound track. There is some conflict in the testimony as to whether she was struck by the east-bound car when she had crossed the first or the second rail, but when struck she was on the track, and there is evidence tending to establish that the east-bound car was running at a high rate of speed, that the gong or bell was not being sounded, that appellee was knocked about 20 feet, that the car ran 100 feet before being stopped, and that the motorman at the time appellee was struck was looking back at some ladies standing in a door on the side of the street, and that appellee did not see or hear the approaching car when she stepped on the

Digitized by Google

east-bound track. The evidence for appellant was to the effect that the gong was being sounded, that the car was under good control, and running at a low rate of speed, and the motorman keeping a sharp lookout, his testimony being that the west-bound car prevented him from seeing the appellee until she stepped on the track immediately in front of his car, and too late to enable him to stop before striking her.

Some eye-witnesses to the injury testified that the west-bound car had just started when appellee was struck; others, that the car had gone about ten feet. It was plainly the duty of the servants of appellant in charge of the east-bound car to have it under perfect control, to sound the gong, and run at a slower rate of speed when approaching the car that was standing on an adjacent track for the purpose of permitting passengers to alight. Where there is a double track the street cars in use are usually so constructed or arranged that passengers can only alight from the side of the rear platform that is farthest from the other track, and, if they desire to cross the street, it is usual and customary to do so immediately behind the car from which they have alighted, as the cars stop to discharge passengers at the street crossing, and, while going behind the car for the purpose of crossing the street, their view of a car approaching on the other track in an opposite direction is obstructed, nor can the person in charge of the car see them until they get from behind the car from which they have alighted, and, when they do so. they are necessarily either on or in dangerous proximity to the track upon which the other car is approaching. When a car has been stopped at the usual place for discharging passengers, it is the duty of those in charge of an approaching car on the other track

Digitized by Google

to have it under such control that it may be stopped at a moment's notice, so that persons who have alighted may cross the track safely. It is manifestly dangerous, while passengers are alighting from a car, to permit another car, not under perfect control, to run by it on the adjacent track, as the motorman cannot discover the peril of the person attempting to cross the track in time to prevent injury, and it must be anticipated that persons who have alighted from a standing car at a street crossing may cross the street immediately behind it. It is said that it is the duty of the passenger after alighting from a street car to stand in the street until the car has gone a sufficient distance to enable him to see an approaching car, and to allow persons in charge of the approaching car to discover them; in other words, that it is the duty of passengers to exercise ordinary care for his own safety. That is true, but the passenger is not to be charged with negligence because he fails to anticipate that the company from whose car he has just alighted will place him in imminent peril from another car before he has had opportunity to reach a place of safety. The duty that persons operating street cars owe to passengers does not end immediately when the pasenger has stepped safely to the ground. They are required to, and should, exercise ordinary care to prevent injury by their cars to persons who have left the car while they are attempting to reach the street or a place of safety. It was, of course, the duty of appellee, when she started to cross the tracks, to exercise ordinary care for her own safety, but, although she failed to do this and her failure may have contributed to such an extent to bring about the injury of which she complains, that it would not have happened except for her failure to exercise this degree of care, this will not relieve the appellant of

Digitized by Google

liability if the persons in charge of the car that struck her could, by the exercise of ordinary care, have discovered the peril appellee was in, and, by the exercise of ordinary care, have prevented the injury to her. It was the duty of the motorman in charge of the car at this point and place to keep a sharp lookout for persons alighting from the car, and who might be expected to cross the street immediately behind it, and to have his car under such control that he might stop it at a moment's warning, and it is manifest that, if the motorman had exercised this degree of care, he could and should have discovered the appellee's peril in time to have prevented injuring her. It was, therefore, entirely proper under the facts in this case to qualify the instruction as to contributory neglect, as was done.

The rule herein expressed as to the duty that street car companies owe to protect their passengers from being injured by cars on a track adjacent to the one from which they have alighted has been applied in substance and effect by the Supreme Court of Illinois in Chicago City Railway Company v. Mary A. Robinson (Ill.), 18 N. E. 772, 4 L. A. R. 126, 11 Am St. Rep. 87, where the court held that, "where street car tracks are in close proximity, to run a car or train of cars in one direction at a rate of speed and without signal or warning over a sidewalk crossing while a car or train bound in the opposite direction is discharging passengers at such crossing, and where, in this case, the view of the approaching train is obstructed by the standing cars from which the injured person has just alighted is surely conduct which fairly tends to prove culpable negligence, even though the rate of speed of such approaching train does not exceed that which is permitted by ordinances."

Digitized by Google

Perceiving no error in the record, the judgment is affirmed.

CASE 13—PROCEEDINGS BY THE COMMONWEALTH AGAINST THE ADAMS EXPRESS COMPANY FOR THE LISTING OF OMITTED PROPERTY FOR TAXATION.

Commonwealth v. Adams Express Co.

124 85
132 599

Appeal from Mason Circuit Court.

JAMES P. HARBESON, Circuit Judge.

From a judgment of the Circuit Court dismissing an appeal from a judgment of the County Court in favor of defendant the Commonwealth appeals. Affirmed.

Taxation—Omitted Property—Special Proceeding—New Trial—Filing Appeal—The listing for taxation of omitted property is a special proceeding wholly regulated by sec. 4241 Ky. Stats., for which an appeal is provided from the decision of the county court to the circuit court, which under sec. 728 of the Civil Code must be filed in sixty days from the rendition of the judgment, and there being no power given the county judge after he has entered his judgment, to grant a new trial any orders which he may make in noting the filing of or overruling a motion for a new trial are void and do not stay the proceedings on the judgment, and the appeal is lost unless filed within sixty days from the rendition of the judgment.

A. B. & A. D. COLE AND J. M. COLLINS for Commonwealth Appellant.

W. H. WADSWORTH for Appellee.

Digitized by Google

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

John J. O'Donnell, an auditor's agent, filed his statement in the Mason county court against the Adams Express Company, seeking to have certain property listed for taxation under section 4241, Ky. St., 1903, alleging that the property had been omitted from the list filed by the Adams Express Company. The company denied that it had omitted any property from its list, and on the issue thus joined proof was taken, and upon final hearing on September 4, 1905, the county judge dismissed the original statement and the several amendments thereto, and adjudged that the express company had not omitted any of its property for the years named in the statement and its amendments. The auditor's agent thereupon filed a motion and grounds for new trial. No further steps were taken in the case until January 1, 1906, when the county judge overruled the motion for a new trial, and the commonwealth tendered its bill of exceptions, which was signed by the Judge, filed and made part of the record. The case was then taken to the Mason circuit court and docketed for trial as an appeal case. At the February term, 1906, of the Mason circuit court, the express company moved to dismiss the appeal, on the ground that it had not been taken within the time required by law after the rendition of the judgment appealed from, and the circuit court sustained the motion and dismissed the appeal.

The original judgment was rendered September 4, 1905. The appeal was taken January 1, 1906, which was, of course, more than 60 days from the date of the rendition of the judgment appealed from; and unless the motion for a new trial filed by the common-

Digitized by Google

wealth on September 4, 1905, stayed proceedings until it was overruled on January 1, 1906, the commonwealth must fail. Section 4241, Ky. St., 1903, provides the manner in which the auditor's agent must proceed. This section is complete in itself. It gives to the county judge the right to exercise his discretion in determining whether or not the property sought to be taxed is subject to taxation as omitted property, and it then provides that, when this discretion has been exercised, either party feeling himself aggrieved may appeal, as in other civil cases. Section 729, Civil Code Prac., provides that all appeals from a judgment of a county court must be prosecuted within 60 days from the date of the judgment appealed from. Section 4241 makes no provision for a new trial, and says distinctly that the party not satisfied with the judgment of the court may appeal. Section 725 of the Code provides the manner in which the appeal is taken. The listing for taxation of omitted property is by special proceeding, regulated wholly by statutory provision. It was evidently the purpose of the legislators, in providing for an appeal from the judgment of the county court, to provide a speedy method for final determination as to whether or not the property sought to be subjected should be taxed, and hence they made no provision for application for a new trial before the county judge, but provided for an appeal direct from his ruling, thus securing to both the commonwealth and the party sought to be taxed a speedy determination of the questions in issue. This court has held, in the case of Taylor v. Tibatts, 13 B. Mon., 177, that, where a will had been admitted to probate in the county court, the court could not thereafter grant a retrial or set aside the order of probate made at a previous term. And again, in the case of McCarty v. McCarty, 8

Digitized by Google

Bush, 504, where an order had been entered in the county court admitting to probate a will, and thereafter application was made to vacate the order of probate, and the court, on hearing of the motion to vacate, entered an order declaring the order probating the will null and void, this court, Judge Pryor delivering the opinion, said: "The only remedy provided for the unsuccessful party, where a will has been rejected or admitted to record by the county court, is by writ of error or an appeal to the circuit court of the same county, and thence to the court of apepals. The will, once admitted to probate by the county court, must be contested in the manner pointed out by the statute. This special proceeding is adopted and regulated by law as applicable to wills alone, and the remedies afforded in such cases must be found in the statute, and nowhere else. There is no power given to the county court, after a will has been admitted to record or rejected, to grant the parties a new trial, or at a subsequent term, to annul the orders made in regard to the case at a previous term."

The same rule of reasoning may, by analogy, be applied to the case at bar. The only remedy provided for the unsuccessful party, where the property has been listed by the county judge, or he has refused to list same, is by an appeal to the circuit court, and a judgment entered by the county court must be contested in the manner pointed out by the statute. This special proceeding is adopted and regulated by law as applicable to the listing of omitted property for taxation, and the remedies afforded in such cases must be found in the statute, and nowhere else. And, there being no power given the county judge, after he had entered his judgment refusing to list the property sought to be taxed, to grant to the parties a new trial,

Digitized by Google

the orders which he made in noting the filing of the motion for a new trial and in overruling same were void, and of no binding force or effect, and they did not stay proceedings on the judgment.

The judgment is affirmed.

CASE 14—ACTION BY M. L. INGE AND ANOTHER AGAINST P. F. CRAFTON AND OTHERS FOR A DIVISION OF THE LANDS OF A DECEDENT BETWEEN HIS HEIRS.—December 12.

Crafton, &c. v. Inge, &c.

Appeal from Henderson Circuit Court.

J. W. HENSON, Circuit Judge.

Judgment for plaintiffs. Defendants appeal. Reversed.

1. Descent and Distribution — Advancements—Sufficiency of Evidence.—Evidence held to show that a conveyance made to a daughter and her husband was intended as an advancement to her and not in consideration of a purchase price mentioned in the deed.
2. Witnesses—Competency—Conversation had with Deceased Person.—Under the express provisions of Civ. Code Prac., sec. 606, limiting the competency of testimony concerning conversations and transactions had with persons since deceased, plaintiff could not show that, in a conversation had between him and decedent, services to be performed, etc., were agreed upon as the consideration for a conveyance of land made by decedent to himself, where no other person was present at the conversation and no one interested in the estate testified against plaintiff in reference thereto.
3. Same—Persons Interested in Estate.—Plaintiffs claimed that

Digitized by Google

the consideration for land conveyed to them by decedent was the performance of services, etc. Decedent's widow testified that the conveyance was made as an advancment. Held that, since her property rights could not be affected by plaintiff's claim her evidence was not embraced by Civ. Code Prac. sec. 606, permitting a person to testify as to transactions with a decedent when one interested in his estate shall have testified against such person with reference thereto.

4. Same.—Civ. Code Prac., sec. 606, permits a person to testify as to transactions with a decedent when one interested in his estate shall have testified against such person with reference thereto. Held, that plaintiff could not make his testimony as to a transaction with a decedent competent by eliciting as new matter, on cross-examination, testimony against himself as to the transaction from one interested in the estate.

5. Deeds — Consideration — Conclusiveness of Recital. — The recital of the consideration in a deed is not conclusive evidence of its truth, as it may be shown by verbal testimony or by circumstances that the recited consideration is not true.

THOS. E. & E. C. WARD for Appellant.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Advancements: (Section 1407 Kentucky Statutes; Cleaver & Wife v. Kirk's Heirs, 60th, Ky. P. 270; Clark, &c. v. Clarke, 56th. Ky., P. 699, &c.)

2. Is a party to a verbal contract with a decedent a competent witness to establish such contract? (Sub-division 2 of Section 606, Civil Codes of Practice. Carpenter v. Rice's Admr., 25 Ky. Law Rep., Page 1704: Rives, &c. v. Garrott, &c., 25 Ky. Law Rep., Page 2165.

W. P. McCLAIN for Appellees.

AUTHORITIES CITED.

1. An unrecorded deed evidence of purchase for a valuable consideration. (Morton v. Robards, 4 Dana 260.)

2. The recital of consideration in deed is conclusive. (Powell's Heirs v. Powell's Heirs, 5 Dana 170; Gordon's Heirs v. Gordon's Heirs Metcalfe, Vol. 1, 288.)

Digitized by Google

3. Deed of land best evidence of terms of sale. (Brown v. Parish, 2 Dana, 9; Armitage v. Wickliffe, 12 B. M., 498; Bourne v. Bourne, 92 Kentucky, 211; 13 Reporter, 545; 12 Reporter, 467.)

4. The statute alone regulates advancement—declaration of parents or grand-parents of no effect. (Clark v. Clark, 17 B. M., 708; Shawhan v. Shawhan, 10th Bush, 602; Bowels v. Winchester, 13th Bush 6.)

5. Until final orders are signed court has control of its proceedings: (Kanatza v. Kanatza's Trustee, 4th Ky. Law Rep., page 448.)

6. Judgment of lower court shall have consideration: (Deshazer v. Deshazer, 1st Reporter, 159; Williams v. Rogers, 4th Bush, 776.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

M. L. Inge and his wife, who was a daughter of M. J. Crafton, brought this suit for a division of the lands of Crafton. The widow and the other children in the answer sought to charge Inge and his wife with $1,400, the value of 92 acres of land deeded to them in 1884 by M. J. Crafton, alleging that the same was an advancement to his daughter, Mrs. Inge. The chancellor adjudged that this land was purchased by them from M. J. Crafton, and therefore could not be considered an advancement. The only question to be determined is whether or not this land should be charged as an advancement.

M. J. Crafton died, leaving surviving him his widow, a daughter, Mrs. Inge, who married in 1882 when she was about 19 years of age, and two other children, both of whom are living. He owned at the time of his daughter's marriage, and at his death, a good farm, and was a prosperous, industrious business man. Inge, previous to the marriage, had worked for him, and afterwards he and his wife lived with Mr. Crafton for some 15 months. In January, 1884, for the recited consideration of $1,400 cash in

Digitized by Google

hand paid, M. J. Crafton conveyed to Inge and his wife the land in controversy, but they did not have the deed recorded until 1903, and after the death of Mr. Crafton. Inge does not claim that any cash consideration was paid for the land, but his contention is that it was paid for by giving to M. Crafton the proceeds of the place and his services for two years immediately succeeding his marriage, which services and the profits of the place were equal in value to $1,400. The evidence to the contrary is that this land was given to Inge and his wife as an advancement, and that the $1,400 mentioned in the deed was inserted as the value of the land at that time, and the price at which it should be charged as an advancement, and there is no dispute about the proposition that the land when deeded to Inge and wife was worth that price. It does not appear that Crafton had any kindlier feelings for Mrs. Inge than for his other children, or that he intended to make any substantial difference between his children in the distribution of his estate. Unless this land is charged to Mrs. Inge as an advancement, she will receive from the estate $1,400 more than either of the other children. If, however, the land was actually bought and paid for by Inge, it would be unjust and improper to charge his wife with it in the settlement of the estate. The evidence, which we have carefully examined, leaves the impression that this land was conveyed to Inge and his wife by Mr. Crafton as an advancement and not in consideration of the purchase price mentioned in the deed, and we will proceed to state briefly the reasons that induce us to reach this conclusion. Two years before the land was conveyed, Inge had married the daughter of Crafton, who was his oldest child. Inge had no property of consequence, and the marriage was not agreeable to Mr. Crafton, but after

Digitized by Google

the marriage took place they continued to live at his home, and it is reasonable to assume that he desired to help his daughter in some substantial way, and with this object in view conveyed to them jointly this land, inserting as the purchase price $1,400 to show the value of the land, rather than what was paid for it. If the deed had been made to Inge alone, there would be more force in the proposition that he purchased the land, and the fact that the conveyance was to him and his wife strengthens the conclusion that it was intended as a gift to his daughter. Nor is this presumption overcome by the fact that the deed recites a cash consideration of $1,400, it being admitted by Inge that, as a matter of fact, no cash consideration was paid, and, when it is considered that Mr. Crafton was a capable, active, industrious business man, it is not reasonable to assume that he would have been willing to give Inge, as a business proposition, $1,400 for his services for two years, although Inge might in addition have given to him all that he made on the farm during those years. The land cultivated by Inge belonged to Mr. Crafton, and out of the proceeds of his labor he received a support for himself and family; and, although there is testimony to the effect that his services were worth each year $600 to $700, we do not feel authorized to adjudge that he paid as the purchase price for this land the sum of $1,400. The fact that Inge did not have the deed recorded during the lifetime of Mr. Crafton lends color to the theory that he did not buy the land, as it is not usual for persons who have bought and paid for land to retain the deed conveying it for a long period of time without having it put to record.

If the testimony of Inge is competent, there is no evidence in the case, aside from the recital in the

Digitized by Google

deed as to what consideration, if any, was paid, and it is manifest that Inge's testimony is not competent. Section 606 of the Civil Code of Practice provides: "* * * No person shall testify for himself (d) concerning any verbal statement of, or any transaction with, or any act done or omitted to be done * * * by one who is * * * dead when the testimony is offered to be given, (e) except for the purpose and to the extent of affecting one who is living, and who, when over fourteen years of age and of sound mind, heard such statements, or was present when such transaction took place, or when such act was done or omitted, unless: * * * (c) The decedent, or a representative of, or some one interested in his estate, shall have testified against such person with reference thereto. * *" No person was present when the conversation with Mr. Crafton related by Inge took place, nor had any person interested in the estate testified against Inge with reference to the statements. The widow testified that the land was given to her daughter as an advancement, and at her suggestion it was deeded to both of them jointly. Mrs. Crafton, however, is not interested in the estate except to the extent of the property given her under the statutes of descent and distribution and those relating to dower, and her rights in respect to this property cannot be diminished or enlarged by the claim asserted by Inge. So far as her property rights are concerned, they will be the same whether Inge succeeds or not, and therefore her evidence is not embraced by the Code provision authorizing a "person to testify as to transactions with the decedent when some person interested in his estate shall have testified against such person with reference thereto." The language, "some one interested in his estate," has reference to a person whose

Digitized by Google

property rights will be in some way affected by the declarations made by the decedent to the person asserting a claim against, or interest in, his estate. When a person who has an interest in the estate, antagonistic to that of the person asserting a claim against it, testifies, then such person may give testimony in his own behalf. But for the saving of this exception in the Code a person asserting a claim against an estate would be placed at a disadvantage, and his claim, however just, might be defeated by the evidence of persons directly interested in overthrowing it. To relieve this hardship, the saving clause in the Code was inserted. Charles Crafton, a son of M. J. Crafton, testified that he heard his father say that he gave this 92 acres of land to Inge and his wife, but this testimony was brought out as new matter on the cross-examination by counsel for Inge, and consequently did not authorize Inge to testify with reference to it, as a person asserting a claim against an estate will not be permitted to make testimony by persons interested in the estate for the purpose of testifying himself as to transactions with the decedent.

The recital of the consideration in the deed is not conclusive evidence of its truth, as it may be shown by verbal testimony or by circumstances that the recited consideration was not true. Engleman v. Craig, 2 Bush, 424; Louisville R. Co. v. Neafus, 93 Ky., 53, 13 Ky. Law Rep., 951, 18 S. W., 1030.

As we have reached the conclusion that no valuable consideration was paid for the land, it must, under the statute, be charged to Mrs. Inge as an advancement. Therefore the judgment is reversed, with directions to the lower court to proceed in conformity with this opinion.

Digitized by Google

CASE 15.—ACTION BY J. N. RAYMER AGAINST THE TRUSTEES OF WHITE SCHOOL DISTRICT NO. 18 TO ENFORCE A JUDGMENT OBTAINED IN THE QUARTERLY COURT FOR BUILDING A SCHOOL HOUSE.—December 14.

Raymer v. White School District No. 18

Appeal from Edmonson Circuit Court.

JOHN M. GALLOWAY, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

School Districts—Building House—Quarterly Court Judgment—Conclusiveness — Lien — Enforcement — Levying Tax — R. obtained a default judgment in the quarterly court against a school district for a balance due him for building a school house therein under contract with the trustees, on which execution was issued, and returned no property found. He then filed suit in the circuit court, setting up his judgment, execution and return, alleging a lien on the school house, therefor which he asked to be enforced, or for possession, of the house, to which the circuit court sustained a demurrer. Held—That the judgment of the quarterly court, not having been appealed from, is conclusive as to any matter of defense which was or which should properly have been pleaded thereto, and, although the plaintiff has no lien on the house, or right to remove it, under his prayer for general relief, upon the facts stated, he is entitled to a judgment requiring the trustees to levy a tax to pay his claim.

MILTON CLARK, M. M. LOGAN and ORA E. HAZELIP for Appellant.

AUTHORITIES CITED.

Grady v. Prewit, 23 Ky. Law Rep., 506; Grady v. Landrum, 23 Ky. Law Rep., 206; Trustees of Fordsville v. Postell, 28 Ky. Law

Digitized by Google

Rep., 37; Dean v. Cassidy, 11 Ky. Law Rep., 105; Daily v. Cain, 11 Ky. Law Rep., 936; Hoffman v. Hoffman, 5 Ky. Law Rep, 935.

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

In the year 1898 the trustees of White School District No. 18 of Edmonson county made a contract with J. N. Raymer to furnish the material and build a schoolhouse for the district, at the price of $325. He built the house in compliance with the contract, and they paid him thereon the following sums: $50.33, October 1, 1898; $50.50, June 3, 1899; $60.93, November 3, 1900; and $63.82, December 2, 1901. They refused to pay the balance of his debt, and on June 26, 1905, he instituted suit in the Edmonson quarterly court against the school district, and at the July term of that court obtained a judgment against the school district for the balance of his debt, with interest and costs. Execution was issued on the judgment, and returned "No property found." He then filed this suit in the Edmonson circuit court, alleging that he had a lien on the house and lot, and praying that the lien be enforced, or, if he was not entitled to that relief, that he be adjudged the possession of the house, and all proper relief. The circuit court sustained a demurrer to his petition and dismissed the action. From this judgment, he appeals.

The ruling of the circuit court seems to have been based upon the idea that the trustees in building the schoolhouse were proceeding under the statute authorizing them to make a levy to pay for it, without submitting to the people the creation of an indebtedness in excess of the revenues of that year. This would have been a good defense for the trustees in the original action which was brought against

Digitized by Google

them to recover the debt, and, when judgment went against them in the quarterly court, they might have taken an appeal from the judgment of that court and presented this matter to the circuit court on appeal. But when they did not do this, and allowed the judgment of the quarterly court to become final, it is a bar to any further litigation as to the justice of the claim against the district. In Hardwicke v. Young, 110 Ky., 504, 23 Ky. Law Rep., 1906, 62 S. W., 10, it was held that a judgment dismissing a suit to restrain the collection of school taxes, brought upon the ground that the plaintiff's property was not taxable in the district, was a bar to a subsequent action by the plaintiff to enjoin the collection of the same taxes on the ground that they were imposed in violation of the Constitution, as it was the duty of the plaintiff to present in one suit all matters touching the validity of the taxes sought to be enjoined. The principle settled in that case is conclusive here Whether the district was liable upon the contract with Raymer was a question necessarily involved in the suit in the quarterly court. Whatever defense the district had to the claim should have been presented then. If for any reason its defense was not made in the quarterly court, it might have appealed to the circuit court and there put in its defense, as on such appeals the case is to be tried de novo. But it was incumbent on the court to decide, when suit was brought upon the claim, whether it was a just claim against the district, and when the court entered a judgment in favor of the plaintiff against the district this was a conclusive determination that plaintiff's claim was just.

It is true that, under the Constitution, a district or municipality cannot create a liability in excess of the revenues provided for the year, and that the munici-

Digitized by Google

pality cannot afterwards assume the liability. But some court must decide whether the district became indebted beyond the revenue provided for the year, without the assent of two-thirds of the voters voting at an election held for that purpose; and when this question is once decided, whether the decision is erroneous or not, it is binding, unless set aside in proper proceeding. An erroneous judgment may be reversed on appeal. A collusive judgment, or one obtained by fraud, may be opened upon petition. But, so long as the judgment stands, it is conclusive as to every matter of defense which was pleaded in the action, or which should properly have been pleaded. The section of the Constitution referred to does not change the rule of res adjudicata. The district, when sued upon a claim against it, must make its defense as any other litigant, and, if it fails to do this, the judgment rendered against it is binding upon it so long as it remains in force, just as it would be against any other litigant. Were the rule otherwise, the district might, in the first suit, offer half of its evidence, and when sued on the judgment plead the same facts it had pleaded before and offer the evidence it failed to produce on the first trial. No judgment against it could be final, and its day in court would have no end upon such a construction of the Constitution. There must be an end of litigation. A party when sued on a debt must present all the defense to it he has, and he must in that action introduce all his proof. A litigant who has capacity to sue and be sued is bound by a judgment, although he may not have properly presented his defense, and public corporations are no exception to the rule.

We therefore conclude that the justice of Raymer's claim cannot be litigated in this action, so long as the judgment of the quarterly court remains in force.

Digitized by Google

He has no lien on the house, he has no right to remove the house from the lot; but upon the facts stated in the petition, under the prayer for general relief, he is entitled to a judgment requiring the trustees to levy a tax to pay the claim.

The judgment is reversed, and cause remanded for further proceedings consistent herewith.

CASE 16—ACTION BY HUSTON H. JOLLY AGAINST MATTHIAS MILLER TO SET ASIDE A DEED AND COMPEL AN ACCOUNTING AS ADMINISTRATOR. —December 14.

Jolly v. Miller

Appeal from Breckinridge Circuit Court.

WEED S. CHELF, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Affirmed.

1. Appeal—Decision on Merits—Appeal from Decision on Demurrer.—On appeal from a decision on a demurrer to a complaint in a suit to set aside a deed, where all the pleadings are before the court, the merits of the case should be passed upon.
2. Limitation of Actions—Accrual of Right of Action Against Trustee—Cancellation of Deed.—Defendant was appointed administrator of the estate of his brother and was authorized by the heirs to compromise claims belonging to the estate and also given a power of attorney to sell and convey real estate. Subsequently on February 20, 1892, plaintiff, an heir, sold and conveyed to defendant his entire interest in the estate. January 1, 1902, defendant resigned as administrator, and April 26, 1904, plaintiff brought suit to set aside his conveyance for fraud and compel an accounting. At the

Digitized by Google

time of bringing suit defendant's successor as administrator had not made a final settlement of his accounts. Held that, as plaintiff's conveyance on February 20, 1892, terminated the trust relationship between the parties, the statute of limitations limiting the time for the bringing of this action began to run on that date, and was not suspended until defendant or his successor had made a final settlement.

3. Same.—Whenever a trustee, whether the trust be created by power of attorney or by appointment as guardian, executor, or administrator, repudiates the trust and asserts title to the subject of the trust, the statute of limitations begins to run when a knowledge of the repudiations is brought home to the cestui qui trust.

4. Cancellation of Instruments—Additional Relief—Conveyance to Administrator.—An heir, who has conveyed his interest in the estate to the administrator and subsequently sues to set aside the deed for fraud and asks for an accounting, cannot require an accounting until the conveyance is set aside.

5. Limitation of Actions—Pleading in Avoidance of Defense.—Where defendant, in addition to traversing the allegations of the petition, pleads the statute of limitations and plaintiff joins issue thereon, the traverse of the plea of limitations is bad and interposes no real defense to the plea.

6. Same—Demurrer Raising Defense—Statute of limitations as a defense cannot be raised by demurrer.

7. Appeal—Harmless Error—Sustaining Demurrer.—Defendant pleaded statute of limitations, and, after plaintiff's demurrer had been overruled, he traversed the affirmative allegations of the answer and thereafter filed an amended petition to which defendant demurred on the ground of limitations. Pending the demurrer an answer was filed and demurrer thereto interposed, and, pending the demurrer, a reply was filed. Defendant withdrew his answer to the amended petition and renewed his demurrer to the amended petition, which demurrer was sustained. Held that, while the demurrer to the amended petition should have been sustained, the reply to the plea of limitations was bad, and the court on the pleadings as a whole should have rendered the judgment which it did.

CLAUDE MERCER for Appellant.

N. McC. MERCER of Counsel.

Digitized by Google

1. Where a petition and amended petition each allege the existence of a trust relationship of administrator and heir and of principal and agent, at the time of the consummation of a sale complained of, such averments, in themselves, allege the existence of grounds which avoids or suspends the statute of limitations, and even though the petition and amended petition, upon their face show that more than ten years has elapsed since the sale complained of, yet, 'tis improper to raise the question of limitation by the filing of a demurrer, and a judgment sustaining a demurrer filed to such petition and amended petition with such averments, thereby attempting to raise the question of limitations, will be reversed and a judgment dismissing such petition and amended petition will be set aside.

2. The statute of limitations must be relied upon by a plea, and never can be raised by demurrer, unless the petition and amended petition disclose that the statutory period has elapsed before the filing of the petition and amended petition, and the petition and amended petition fail to show the existence of any grounds of avoidance of the statute.

3. Where a petition and amended petition specially aver the existence and continuation of a trust relationship of administrator and heir and of principal and agent, and the defendant desires to rely upon the statute of limitations as a defense, such defense must be specifically plead and furthermore the plea must contain such a statement of facts, as in themselves, show that the statute of limitations constitutes a valid defense, notwithstanding the averments of trust relationship existing as pleaded in the petition and amended petition.

4. The plea of limitations as set forth in the defendant's answer herein is wholly insufficient to entitle him to that relief, even though he were entitled to such relief when properly pleaded, for the reasons that no statements of facts appear therein to show that defendant is relieved by lapse of time, notwithstanding the averments of the petition and amended petition showing the existence of a trust relationship, and the demurrer, filed thereto should be sustained.

5. Where gross inadequacy of consideration appears in all transactions as between persons occupying any confidential relationship at the time of a sale, evidence of good faith, of the condition of the estate, of knowledge of the value of the estate will be disregarded and fraud will be presumed and the trustee and purchaser will be compelled to account to and pay over to the cestui que trust all profits accruing in the purchase—over and above the purchase price and the purchase price will

Digitized by Google

be considered as a payment upon the amount due the cestui que trust from the estate, by the trustee.

6. The trustee having admitted that he has profited largely in the sale complained of in this action, he will be compelled to account to and pay over such profits to the cestui que trust.

7. Where a trustee buys the interest of the cestui que trust by misrepresentations and fraud, without having renounced his trusteeship or notified the cestui que trust of his renunciation, and his trusteeship has not been revoked by said cestui que trust, said trustee will be continued as such, by operation of law, and will be compelled to account to the cestui que trust for the profits.

8. An administrator is not permitted to buy the interest of the heir and profit thereby and shall he do so he cannot rely upon the statute of limitations as a defense, because during the administration of an estate and before it is settled up, his position as administrator is a subsisting and continuing trust within the meaning of section 2543 of the statutes which exempts such from the operation of the statute of limitations, and limitations will only commence to run in favor of such administrator and against an heir whose interest he has purchased, after the estate has been finally settled and the interest of the heir is ascertained.

9. An administrator who purchases the interest of an heir during the course of the administration of said estate and in said purchase, by deed, includes both realty and personalty, limitations will not be computed from the date of said purchase but only from the time the estate may be settled up and the interest of the heir is ascertained.

10. An agent who purchases from his principal, the property in his hands, without having openly renounced his agency to the principal cannot rely upon the statute of limitations as a defense to defeat the right of the principal to recover the profits realized thereby, as in the absence of such renunciation by the agent, or revocation of agency by the principal the privity of relation of principal and agent still exists and there is nothing to set in operation the statute of limitations in favor of said agent as against the claims of the principal.

11. The estate in this controversy being yet unsettled finally, the appellee who was the administrator of it from 1888 to 1902, when he resigned, cannot rely upon the statute of limitations to prevent the appellant from recovering from the appellee the profits he made in the purchase of appellant's interest, while appellee was the administrator.

12. The appellant having made the appellee his agent in the

Digitized by Google

handling, management and control of the real estate belonging to intestate's estate, and said agency was for an indefinite period contemplating the full period required to settle said estate, and said real estate, belonging thereto, having not yet been disposed of and appellee never having renounced his agency to the appellant, nor appellant never having revoked said agency, the appellee cannot interpose a plea of limitations in bar of appellant's right to make him account for the profits realized in a sale of appellant's interest, though made by deed more than ten years before the institution of this action.

13. This action being one to require an accounting for profits upon the part of a trustee, then it could only be barred fifteen years after the termination of the trusteeship and the interest of the cestui que trust is ascertained. The ten year statute of limitations attempted to be pleaded in no event could constitute a valid defense to an action for an accounting.

14. The deed made by appellant to appellee in consummation of said sale is valid in every particular except as to consideration and upon accounting for the profits need not be disturbed.

AUTHORITIES CITED.

Pritchford v. Gatewood's adm'r., 10 L. R., 112; Civil Code of Practice, section 134; Humphrey v. Hughes, 79 Ky., 487; Patrick v. Sweeney, 5 Bush, 421; National Mutual Association v. Jones, 84 Ky., 110; Chiles v. Drake, 2 Metc., 146; Stuart v. L. & N. R. R., 10 R., 542; Jones v. Jones, 5 R., 774; Slayden v. McDonal, 15 R., 28; Kentucky Statutes, Section 2543; Lexington's Trustees v. Lindsay's heirs, 2 A. K. M., 443; Thomas v. White, 3 Litt., 177; Pugh's heirs v. Bell's heirs, I. J. J. M., 398; Helm's ex'or v. Rodgers, 81 Ky., 568; Hendrick v. Robinson's adm'r, 7 Dana, 167; Bohannon's heirs v. Sthreshler's exor., 2 B. M., 437; Hargis, etc. v. Sewell's adm'r., 87 Ky., 63; App v. Driesbach, 21 Amer. Decisions, 451; Robinson's committee v. Elam's adm'r., 90Ky., 300; Richardson v. Chanslor's Trustee, 103 Ky., 425; McHarry v. Irvin's Ex'ors, 85 Ky., 323-347; Keeler v. Keenan, 5 T. B. M., 573; Black v. Keenan, 5 Dana, 570; Markwell v. Gray, 9 R., 534; Faucett v. Faucett, 1 Bush, 511; Handlin, etc. v. Davis, etc., 81 Ky., 34; Price v. Thompson, 84 Ky., 219; Downey v. Talbott's adm'r, 4 R., 453; Sue Brown Elliott v. City of Louisville, deeded February 14, 1906.

MURRAY & MURRAY for Appellee.

(No briefs in the record.)

Digitized by Google

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

In July, 1888, James Miller, a wealthy bachelor, and a member of one of the most prominent families in Breckinridge county, died, leaving no will, and his large estate passed by descent to his brothers and sisters and the children of such as were dead, as his only heirs at law. Matthias Miller, one of his brothers, was appointed and qualified as administrator of his estate, and he was also, by writing signed by the heirs at law of the estate of James Miller, deceased, authorized to compromise any and all claims belonging to said estate with the debtors, when, in his judgment, it would be to the best interest of said heirs so to do. This authority to adjust and compromise claims was given him on March 9, 1889, and he was thereafter, on the 15th day of December, 1891, given a power of attorney by all the heirs of James Miller, deceased, authorizing him "to sell and convey in fee simple, and by deed of general warranty, for such price and upon such terms of credit, and to such person or persons, as he should think fit, the whole or any part of the lands and real estate that belong, or may hereafter belong, to the estate of James Miller, deceased. Said lands and real estate are situated in the counties of Breckinridge, Hancock and Ohio." Acting under his power and authority as administrator and agent, Matthias Miller proceeded with the settlement of the estate until 1892, when Huston H. Jolly, on the 20th day of February of that year, sold and conveyed by deed to him, for the sum of $240 cash, his entire interest in and to the estate of James Miller, deceased, which consisted of an undivided one sixty-fourth interest, and is

Digitized by Google

described in the deed as follows: "All my interest in the estate of James Miller, deceased, consisting of lands, personalty and mixed estate of every kind, character and description. Said lands are situated as follows: About 430 acres on Sinking creek, in Breckinridge county; about 250 acres near Cloverport, same county; about 250 acres near Hardinsburg, same county; about 94 acres known as the 'J. Morris land,' same county; about 86 acres known as the 'Pulliam land,' near Hardinsburg; about 135 acres near Ruth's Station on the L. H. & W. R. R., same county; about —— acres near Glendeane Station, same county; about 117 acres known as 'Newman land,' same county; about 100 acres known as 'G. Dowell land,' same county; about 85 acres known as 'William Hinton land,' same county; about 95 acres known as 'Fisher land,' near Cloverport, same county; about 30 acres near North Fork of Rough Bridge, same county; about 40 acres near G. Lawrence, same county; about 125 acres near J. Matthews; about 40 acres near Sam Johnson's; about 125 acres known as 'Fraize Horsley farm;' about —— acres near Bewleyville; about 3 lots in Hardinsburg; 3 lots in Cloverport. The following in Hancock county: About 152 acres known as the 'Farmer land.' and about 340 acres known as the 'Pate land,' and all other lands that said decedent may have owned at his death, or that may since have been purchased for the benefit of the estate." Matthias Miller, about the time of this conveyance, bought out several of the other heirs at law of James Miller, deceased. He continued in the management of the business of the estate, making settlements with the county court from time to time, until the 1st day of January, 1902, when, having been elected county judge of Breckinridge county, he resigned his trust as administrator

Digitized by Google

of the estate of James Miller, deceased, and was succeeded by James W. Miller, a nephew, who is now acting as administrator, and is proceeding with the settlement of the estate. On April 26, 1904, Huston H. Jolly filed his suit in the Breckinridge circuit court seeking to have the deed of conveyance from himself to Matthias Miller rescinded and canceled, and to compel Matthias Miller to account to him for such sums of money as he would have received in the settlement of his uncle James Miller's estate, subject to a credit of $240, the amount which he had received at the date of the execution of said conveyance. He alleges in his petition that the deed of conveyance was procured from him through fraud, deceit, and misrepresentations of his uncle Matthias, in whom he had unlimited and absolute confidence. The defendant demurred to the petition, and, the demurrer being overruled, he answered, admitting his qualification as administrator, his appointment as agent to settle and adjust all claims and sell and convey real estate, and admitting the purchase of plaintiff's interest in the estate, but denying that the conveyance was procured through fraud or misrepresentations, or that plaintiff had not been paid the full value of his interest in the estate, and pleading the statute of limitations in bar of plaintiff's right to recover. Plaintiff demurred to the plea in bar, and, the demurrer being overruled, plaintiff filed his reply traversing the affirmative allegations of the answer. Thereafter plaintiff offered to file an amended petition, which he was, over the objection of the defendant, permitted to file. A demurrer was interposed to this petition as amended, and, pending the demurrer, answer was filed, to which a demurrer was interposed, and, pending this demurrer, a reply was filed traversing the affirmative matter in the answer

Digitized by Google

to the amended petition. Defendant, having with drawn this answer to the amended petition, renewed his demurrer to the petition as amended, and the court, upon final hearing, sustained this demurrer to the petition as amended, and, plaintiff declining to plead further, the petition was dismissed, and plaintiff appeals.

There is but one question in this case raised by the pleadings which it will be necessary to determine, and that is, is the plea of the statute of limitations interposed by the defendant a bar to plaintiff's right of recovery? It is the contention of appellee that. immediately upon the execution of the deed by appel lant on February 20, 1892, the statute of limitations began to run, and that upon that date appellee ceased to act as administrator of the estate of his deceased brother for the benefit of appellant, and ceased to act as agent for appellant in the settlement of the estate of James Miller, deceased; and that appellant's cause of action, if he had any, accrued to him at once upon the execution and delivery of the deed by him to his uncle, Matthias Miller, and the payment to him by Matthias Miller of the $240 consideration for said conveyance. Appellant contends with much earnestness and zeal that the statute of limitations did not begin to run against him upon the execution of said deed, and has not yet begun to run against him, and will not begin to run until after Matthias Miller, or James W. Miller, who succeeded him, has made a final and complete settlement of his accounts as administrator of the estate of James Miller, deceased; that Matthias Miller occupies a trust rela tion toward appellant, and that he cannot deal with him to the disadvantage of his cestui que trust; and that the trustee cannot repudiate the trust and put the statute of limitations in force before he has made a

Digitized by Google

full, final, and complete settlement of his trust estate.

Appellee insists that the sole question for determination is whether or not the trial court erred in sustaining the demurrer to the petition as amended, and in dismissing the petition upon plaintiff's failure and refusal to plead further; while appellant contends that, as the entire record—all of the pleadings in the case—is now before this court, the merits of the case should be passed upon and settled by this court. We are of opinion that the contention of appellant is correct; that, the pleadings all being before us, we should pass upon the merits of the questions involved in this suit, and to that end it will be first necessary to determine from the pleadings the character of the trust created by the powers of attorney and the appointment of Matthias Miller as administrator of the estate of his deceased brother. Is the trust created by his appointment and qualification as administrator, and his acceptance of the powers of attorney authorizing him to settle and adjust claims and to sell and dispose of the real estate, a continuing subsisting trust? If not, when did it cease to be such? Appellee contends that it is not, as to appellant, and has not been since the 20th day of February, 1892; that the relationship of trustee and cestui que trust between appellee and appellant ceased absolutely on that date; and that the statute of limitation commenced to run against appellant on that day. Wood on Limitation lays down this rule: "When the trust is repudiated by clear and unequivocal acts and words of the trustee, who claims to hold the trust property as his own, and such repudiation and claim are brought to the beneficiary in such a manner that he is called upon to assert his equitable right, the statute of limitations will begin to run from the time such repudiation and

Digitized by Google

claim came to the knowledge of the beneficiary." And further: "It is undoubtedly true (generally) that, as against the trustee of an actual, express, or subsisting trust, the statute does not begin to run against the beneficiary until the trustee has openly, to the knowledge of the beneficiary, renounced, disclaimed, or repudiated the trust." Undoubtedly appellant knew on the 20th of February, 1892, that from that time forth appellee would hold the interest which he had that day bought of appellant in the estate of his uncle, not as trustee, but as his own, and that he would no longer account to appellant as agent or trustee or administrator, but that he would hold, manage, and control the interest in the estate of James Miller, deceased, covered by said deed, as his own individual property, and appellant must have known that, so long as that deed remained in force and effect, he had no right, title, or claim to any part of the estate of his deceased uncle, and that, so far as he was concerned, the fiduciary relations between himself and his uncle Matthias Miller, acting in either his capacity as administrator or agent, had ceased.

In the case of Chenault v. Quisenberry, 57 S. W., 234, 22 Ky. Law Rep., 79, this court said that a deed executed by a trustee as trustee, after the property had been conveyed by the cestui que trust to the trustee, was void, because the conveyance of the property by the beneficiary to the trustee revoked the power of attorney under which the trustee became trustee. Under the authority of the rule laid down in the Chenault case, supra, the power of attorney executed by the plaintiff to his uncle Matthias Miller authorizing him to sell the real estate belonging to the estate of his deceased uncle in which he had an interest, and to settle and adjust debts due and owing

Digitized by Google

to the estate, was wholly revoked upon the execution of his deed on February 20, 1892, and, as that deed passed his entire interest in both the realty and personalty, it likewise severed the trust relation existing between himself and his uncle Matthias by virtue of the appointment and qualification of his said uncle as administrator of the estate of James Miller, deceased. In the case of Stillwell, etc., v. Leavy, etc., 84 Ky., 385, 8 Ky. Law Rep., 321, 1 S. W., 593, this court said: "The proposition that the trustee of an express trust cannot throw off his allegiance to his beneficiary and acquire a right to the trust property by adverse holding for the period prescribed by the statute of limitations, unless his acts are so open and notorious as to take notice home to the beneficiary, is denied." In this case the court recognizes the doctrine that, if the title to the property is claimed by the trustee, and that fact is known, then the statute of limitations does apply, and this doctrine applies to all express trusts, regardless of how the relationship was created. In the case of Mitchell & Co. v. Berry, etc., 1 Metc., 619, this court said: "Where a cestui que trust desires to avoid a sale of his estate at which the trustee has become the purchaser, he must apply to chancery in a reasonable time after he has knowledge of the facts which impeach the sale, or he will be presumed to have acquiesced." In this case the guardian ad litem had purchased the property at a public sale, and, while it was held that the relation did not constitute him trustee, yet the court said: "If it were admitted that the guardian ad litem was in the position of trustee, yet the plaintiffs would not be entitled to relief, * * *" because the court found that the beneficiary had knowledge of the transaction, and, although in the possession of that knowledge, had waited an unreasonable length of time

Digitized by Google

before instituting his suit. The doctrine seems now to be well settled that, whenever the trustee, whether the trust be created by powers of attorney or by appointment as guardian or executor or administrator, repudiates the trust and asserts title to the subject of the trust, and a knowledge of this act of repudiation is brought home to the cestui que trust, then the statute of limitations begins to run. In the case of Hall v. Ditto, 11 Ky. Law Rep., 667, 12 S. W., 942, one John Adams held a tract of land as trustee of certain children of David Adams, David having conveyed the land to him as trustee for the children. The trustee traded some negroes to one of the cestuis que trustent for her interest in the land, and thereafter conveyed the land to one, Hall. The court held that the statute of limitations applied, because the cestui que trust had knowledge of the trustee's claiming to own the land. The court said: "This certainly amounted to an open renunciation of the trust created by the deed, and a notorious and open claim adversely to her interest in the land. Unquestionably, the statute then began to run against the cestui que trust." In Helm's Ex'r v. Rogers, 81 Ky., 570, 5 Ky. Law Rep., 569, the court said: "Admitting, therefore, that this case presents what would be an express and continuing trust were not limitation and payment pleaded, we are, nevertheless, of the opinion that, from the fact that the continuance of the relation of trustee was openly denied upon the ground of payment of the trust fund to the cestui que trust. and she acquiesced in the assertion of payment for eight years, and long after the trustee was dead and the means and evidence of payment was lost or obscured, she is not entitled to active interference of a court of conscience," etc. In Smick's Adm'r v. Beswick's Adm'r, 113 Ky., 447, 24 Ky. Law Rep.,

Digitized by Google

276, 68 S. W., 439, the case of Helm v. Rogers is quoted with approval. In the case of Robinson's Committee v. Elam's Ex'r, 11 Ky. Law Rep., 307, 14 S. W., 84, and Berry v. Berry's Adm'r, 15 Ky. Law Rep., 855, 22 S. W., 654, this court held that limitation began to run from the time the beneficiary could bring suit to enforce the trust. In the case of Hoffert, etc., v. Miller, 86 Ky., 572, 9 Ky. Law Rep., 732, reported in 6 S. W., 447, this court held that one could not set aside a deed of land for fraud, nor maintain an action therefor, where the deed was executed more than 10 years before the action was brought, during which time the plaintiff was of full age. In the case of McRoberts v. Carneal, 44 S. W., 442, this court said. "While this court looks with extreme disfavor upon purchases by fiduciaries of their cestuis que trustent, in this case the sale by one party was not to the trustee, but to an outsider, and the other party had slept too long upon his rights." In the case of Covington & Lex. Ry. Co. v. Bowler's Heirs, 9 Bush, 483, this court said: "The cause of action, if one exists, accrued when Bowler finally and decisively repudiated the claim of appellant and asserted title in himself. The limitation to actions of this character is five years." Under the rule laid down in the authorities cited, the cause of action accrued at once to appellant upon the execution by him of the deed to his uncle Matthias Miller.

Appellant had no right or claim to an accounting until he could succeed in having the sale of his interest in his uncle's estate set aside as a fraudulent transaction. By the terms of his deed he had parted with whatever interest he had in the estate of his uncle James Miller, both real and personal. As long as that deed stands uncanceled, it is a binding contract upon appellant, and he is estopped from claim-

Digitized by Google

ing or asserting any interest in the estate of his uncle James. Appellant charges that the deed was procured through fraud and deception practiced upon him by his uncle, who was his agent, and in whom he had great confidence. For wrongs of this character the law affords adequate relief if one feeling himself aggrieved does not "sleep too long upon his rights." The statute (section 2519, Ky. Stats., 1903), says that the extreme limit of this delay may be 10 years, and that, after the lapse of that length of time, no action can be successfully maintained for such relief. The wrong complained of, if any, was done on February 20, 1892. Appellant failed to complain until the 26th of April, 1904, more than 12 years after the date of the alleged wrong. Appellee responds in his answer to the original petition, and, in addition to traversing the allegations of the petition, pleads and relies upon the statute of limitations in such cases made and provided. In this answer the question is squarely raised, and appellant joined issue thereon. This traverse of the plea of statute of limitation is bad; it interposes no real defense to the plea. The court should have overruled the demurrer to the petition as amended, as this court has recently, in the case of Swinebroad et al. v. Wood et al, 123 Ky. 664, 29 Ky. Law Rep., 1202, 97 S. W., vol. 1, p. 25, held that the statute of limitations cannot be reached by demurrer. But, as the reply to the plea of the statute of limitations was bad, the court should have, on the pleadings as a whole rendered the judgment which he did, and dismissed the petition.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 17.—PROSECUTION AGAINST BEN. HUFFAKER FOR MURDER.—December 14.

Huffaker v. Commonwealth

Appeal from Lyon Circuit Court.

THOMAS P. COOK, Circuit Judge.

Defendant convicted and appeals. Affirmed.

1. Criminal Law—Evidence—Hearsay—Affidavit for Continuance. —An affidavit for a continuance of a prosecution for murder of a fellow convict, on the ground of absence of a witness, alleged that, if such witness were present, he would testify that he was guard in charge; that deceased had been reported to him for threatening, and declaring his purpose to assault, defendant; that defendant had so reported, and that witness had forbidden deceased from threatening to assault defendant, etc. Held, that such affidavit was properly excluded from evidence, the statements which it alleged the witnesses would make being merely hearsay.
2. Same—Offenses by Convict—Punishment.—The fact that one convicted of murder is serving a sentence of life imprisonment does not prevent his being tried and sentenced to be hung for the murder of a fellow convict.
3. Same—The fact that appellant was serving a sentence in the Branch Penitentiary at Eddyville, for an offense committed in Pulaski county, did not deprive the Lyon Circuit Court, the county in which Eddyville is situated, of jurisdiction to try him for the killing of a fellow convict.

N. W. UTLEY, Attorney for Appellant.

As appointed counsel to defend a convict in the Eddyville Penitentiary, under sentence for life, charged with the murder of a fellow convict in the penitentiary, I submit:

1. That the appellant being in the penitentiary under a life sentence from another court, to execute the death penalty on him for this offense committed in the penitentiary would be to

Digitized by Google

annul the judgment of another court which cannot be done.

2. The defendant was sent to the penitentiary for life from Pulaski county, and the Lyon Circuit Court had no jurisdiction either of his person or of the offence.

3. He was never legally before the Lyon Circuit Court. He was in the penitentiary and in the custody of its warden, but never was in the custody of the trial court except when brought there by the prison officials—never by any process of any court.

N. B. HAYS Attorney General and C. H. MORRIS for the Commonwealth.

A person may be tried for murder though he is at the time under sentence of life imprisonment for another offense. (People v. Majors, 65, Cal., 183; Kennedy v. Howard, 74 Ind., 87; Ex Parte Ryon, 10 Nevada, 261; People v, Flynn, 7 Utah, 378; Roffin v. Commonwealth, 21 Grat. (Va.) 790; Brown v. State, (Texas) 95, S. W., 1039.)

OPINION BY JUDGE BARKER—Affirming.

The appellant, Ben Huffaker, was serving a life sentence in the penitentiary at Eddyville, Ky., for the crime of murder, committed in Pulaski county. On the 2d day of May, 1905, with a knife he stabbed a fellow convict, B. Sherley, to death. For this offense he was indicted by the grand jury of Lyon county, and afterwards tried and convicted of the crime of willful murder, the penalty of death being inflicted by the verdict of the jury. From the judgment based upon this verdict, he is here on appeal.

It is not disputed that the evidence adduced upon the trial overwhelmingly established the appellant's guilt of the offense with which he stood charged; but it is complained that the court erred in refusing to allow the affidavit filed by him for a continuance to be read as evidence upon the trial of the case. In this affidavit the defendant set forth that he was not ready for trial, and desired a continuance because of the absence of a witness who would testify to certain

Digitized by Google

facts if he were present. The commonwealth's attorney consented that the affidavit should be read as a deposition, subject to exception for competency and relevancy, whereupon the court overruled the motion for a continuance. When the affidavit was offered to be read the court refused to permit it to be introduced, on the ground that the statements which it alleged the absent witness would make, if present, were merely hearsay evidence, and therefore, of course, incompetent. The absent witness was a guard, one Daniel Miller. The following excerpt from the affidavit will show what was expected to be proved by him: "He says if said Miller were present he would testify, and it is true, material, and important, that he was guard in charge, as aforesaid, down to the time of the killing; that deceased had been reported to him for threatening, insulting, and declaring his purpose to assault, this defendant, and leaving his work place and going to defendant's stand for the purpose of threatening him with violence; that defendant himself had so reported to him; and that he, said Miller, had forbidden, under penalty, the deceased from threatening to assault, or insulting, defendant, and from leaving his work place, and going to defendant's stand for the purpose of menacing him for any purpose. * * *" The court correctly excluded the affidavit. The fact that the deceased, B. Sherley, had been reported to Miller as having threatened the defendant did not show that he had made the threats reported, nor did the fact that Miller had forbidden the deceased, under penalty, from threatening to assault or insult the defendant cast any light upon the issue being tried. If the defendant desired to show that the deceased threatened or insulted him, he should have produced the witnessess who knew the facts, and not relied upon

Digitized by Google

one who had only heard that these threats had been made.

It is insisted by counsel that, inasmuch as the defendant was already under a life sentence by the judgment of one court of competent jurisdiction, he could not be tried or punished for any other crime. as to do so would annul the former judgment. The best that can be said for this proposition is that it does credit to the ingenuity of the learned counsel who were appointed by the court to defend the accused. It is, however, as a legal proposition wholly untenable. If it were sound, it would result that a prisoner serving a life sentence could murder every one in the penitentiary without being amenable to the law. No authority is produced, or, in our opinion, can be produced, to uphold so monstrous a conclusion, and it carries with it its own refutation. On the other hand abundant authority can be cited to uphold the judgment of the trial court. In the case of People v. Majors, 65 Cal., 138, 3 Pac., 597, 52 Am. Rep.., 295, it is said: "A person may be tried for murder, though he is at the time under sentence of life imprisonment for another offense." In the case of Brown v. State (Tex. Cr. App.), 95 S. W., 1039, the Supreme Court of Texas said, on the question before us: "We have not been cited to any authority, nor are we aware of any provision of law, statutory or otherwise, that would prevent the trial and conviction of a convict for homicide, or for any other offense committed while he was detained as a prisoner by virtue of a prior conviction. It would take a very strong reason or authority, or an express statute, to show that the person confined in the penitentiary could not be tried and punished for the homicide of one of his fellow convicts." To the same effect is Kennedy v. Howard, 74 Ind., 87; Ex parte Ryon, 10

Digitized by Google

Nev., 261; People v. Flynn, 7 Utah, 378, 26 Pac., 1114, and Ruffin v. Commonwealth, 21 Grat. (Va.) 790.

No complaint is made as to the instructions of the court, nor is any other error, than those already disposed of, pointed out.

It follows that the judgment of the trial court must be affirmed, and it is so ordered.

CASE 18—ACTION BY THE COLUMBIA FINANCE & TRUST COMPANY AGAINST THE LEXINGTON & CARTER COUNTY MINING COMPANY AND OTHERS TO QUIET ITS TITLE AND TO SETTLE ITS ACCOUNTS AS ASSIGNEE.—December 14.

Lexington and Carter County Mining Co. &c. v. Columbia Finance and Trust Co.

Appeal from Carter Circuit Court.

S. G. KISNER, Circuit Judge.

Judgment for plaintiff. Defendants appeal. Reversed.

Assignments for Benefit of Creditors—Sale by Assignee—Order of Court—Jurisdiction.—Under Ky. Stats., 1903, sec. 75, providing that an assignor for creditors shall file his schedule for record in the county where the assignee qualifies, and the deed of assignment shall be recorded in the county clerk's office of the county where the assignor resides, and where the business in respect of the same is carried on, and in each county where a tract of land or a part thereof conveyed by the deed is situated, and section 87, providing that property shall be sold by the assignee as "the court" shall direct, and any exceptions to a confirmation of the report of sale shall

Digitized by Google

be heard by "the court," the county court of the county where the assignee qualifies, and not where the business is carried on, has jurisdiction to order a sale of the assigned estate.

THOMAS R. BROWN AND FALCONER & FALCONER for Appellants.

POINTS AND AUTHORITIES CITED.

1. Jurisdiction. (Emmons and others v. L. & C. Co. M. Co., 112, Ky., 91; Kentucky Statutes, Section 96; Civil Code, Section, 65.)

2. Fraudulent Intent. (Kentucky Statutes, Section 75; Moskovits v. Simon, 23 Rep., 252.)

3. Costs of Suit. (Col. Finance & Trust Co. v. Morgan, 19 Ky. Rep., 1761.)

4. Right of Assignee to Operate Business. (Cooper v. Langford, et. al., 78 S. W. Rep., 197; Tarvin's Assignee v. Tarvin's Creditors, 20 Rep., 730.)

5. Lien Creditors. (Louisville Trust Co. v. Col. F. & T. Co., 22 Ky. Rep., 1086.)

E. B. WILHOIT AND BODLEY & BASKIN for Appellee.

CLASSIFICATION OF QUESTIONS DISCUSSED AND AUTHORITIES CITED.

1. The circuit court of the county where the land lies alone has jurisdiction to quiet title.

2. Where a corporation with an office in Fayette County executes an assignment in Jefferson County and the assignment is recorded in Fayette County and also in Carter County, where all the property and other land lies, the Carter County Court has control and jurisdiction of the assignee, with power to order sale of the land.. (Ky. Statutes, sec. 82.)

3. Where the deed is filed in Fayette County and in Carter County, the assignee must be deemed to have qualified in both counties, under Ky. Statutes, sections 75, 76, etc. And if this action is treated as an action to settle the estate of the assignor the Carter Circuit Court had jurisdiction under Code, sec. 65.

4. The defendants entered their appearance in Carter Circuit Court and filed answers and cross-petitions, thereby consenting to the jurisdiction, if the action be an action to settle the assignor's estate. (John v. Johnson, 12th Bush. 487; Tudor v.

Digitized by Google

Tudor, 101 Ky., 531; McDowell v. C. O. & S. W., 12 Rep., 331.

5. The delay of the assignee in giving bond in Carter County did not effect the validity of the assignment, and the qualification was complete when the bond was accepted by the Carter County Court. (Schuff v. Pflanz, 99 Ky., 105; Johnson v. Logan Co., 111 Ky., 702; City of Chicago v. Gage, 95 Ill., 593; Bank of Commerce v. Payne Viley & Co., 86 Ky., 460.)

6. The Carter County Court ordered the sale by the assignee, confirmed the sale, and no appeal was prayed, as authorized by section 88 of Ky. Statutes, therefore the judgments of sale and confirmation are res adjudicata and final.

7. Judgments of sale and confirmation can not be collaterally attacked. (Gibson v. Lyon, 115 U. S., 439; Voorhees v. Bank, 10 Pet., 449; Ludlow v. Ramsey, 11 Wall., 581.)

8. Appellants in cross-petition do not pray that the sale made under orders of Carter County Court be set aside, but recognize the jurisdiction of Carter County Court and pray that the assignee's accounts be settled in the Carter Circuit Court.

9. The beneficiary can not sue to set the sale aside without paying advances, expenses and the like of the assignee. (Thomas v. Harkness, 13 Bush. p. 30.)

10. Such advancements and expenses must be tendered with the petition seeking the setting aside of the sale. (Davis v. Gaines, 104 U. S., 386.)

11. Judgment of Carter County Court authorized appellee to bid at the sale and such a provision is valid. (Faucett v. Faucett, 1st Bush, 513.)

12. Where the assignee is himself a creditor, he has a right to bid at the sale to protect himself, provided the sale is fairly made. (Leavell v. Leavell, 4th Rep., 889.)

13. The Carter County Court alone had jurisdiction of the assignee to sell lands in that county, unless an action for the same purpose had been pending in the Carter Circuit Court. It would require an express statute to authorize the Fayette County Court to enter an order for the sale of lands in Carter County.

14. There was positively no proof that the assignee committed waste, nor that the property did not bring its full value, it having been offered for sale three times without bidders, was finally bid in by the assignee under the authority of the court at a fourth offer of sale for more than two-thirds of the appraised value, and for less than the indebtedness due the assignee.

Digitized by Google

OPINION BY JUDGE BARKER—Reversing.

The primary question involved in this record is whether the county court of Carter county or the county court of Fayette county had jurisdiction to order the sale of the assigned estate of the insolvent corporation, Lexington & Carter County Mining Company. If the Carter county court had jurisdiction, the judgment of the Carter circuit court must be affirmed; if the Fayette county court had jurisdiction, the judgment must be reversed.

The Lexington & Carter County Mining Company was a corporation created by the laws of the State of Kentucky, having its residence and principal office in Lexington. Becoming insolvent, it, on the 16th day of April, 1896, made a deed of assignment of all of its property to the Columbia Finance & Trust Company of Louisville, Ky. This corporation accepted the trust, and had the deed recorded in the clerk's office of the Fayette county court, and qualified there as by law required, as is shown by the following excerpt from the reply of the plaintiff, which was affirmatively admitted to be true by the rejoinder of the defendants (appellants): "Plaintiff (Columbia Finance & Trust Company), states that on the 16th day of April, 1896, being the day upon which the said assignment or deed of trust was executed, the said mining company had its chief office for the transaction of its business in Fayette county, State of Kentucky, and also had another office for the transaction of its business in Carter county, State of Kentucky, and its property mentioned in the petition was situated in Carter county, Ky.; that on the 25th day of April, 1906, said assignment or deed of trust was filed for record in the office of the clerk of the

Digitized by Google

Fayette county court, and was duly recorded therein; that on the 27th day of April, 1896, the plaintiff filed its bond as assignee in the Fayette county court and filed the oath required by law therein, and said oath and bond were by order of said Fayette county court duly approved, by all of which the plaintiff duly qualified as the assignee and trustee under the assignment or deed of trust dated April 16, 1896. On the 20th day of April, 1896, said deed of trust was also lodged for record and recorded in the Carter county court. Certified copies of the deed of trust and orders made in the Fayette county court and also copies of all orders pertaining to the said trust made in the Carter county court are filed with plaintiff's reply to the answer, set-off, counterclaim and cross-petition of R. J. McMichael, etc., and are referred to and made a part hereof." Afterwards the assignee advanced of its own money the sum of $10,000, in order to keep the mines belonging to the assigned estate in operation; it being of advantage to all parties that this should be done. No question is, or can be, made as to the validity of the assignee's debt. After having made several orders for the sale of the mining property as a whole, without having secured a bid equaling the upset price, the Carter county court, on the 3d day of March, 1898, made another order of sale of the whole property, to take place on the 28th day of March, 1898, describing the advertisement to be made thereof and the terms of sale. No upset price was fixed by this last order, and the assignee, for its own protection, was permitted to become a bidder at the sale. The property was sold to the assignee at the sale had for the sum of $11,117.50, being somewhat less than the amount of its debt. This sale was duly confirmed, and a deed made to the assignee. Afterwards, the

Digitized by Google

assignee, having learned that the appellants were questioning its title to the property acquired as herein stated, instituted this action in the Carter circuit court for the purpose of quieting its title, and also for the purpose of settling its accounts as assignee of the insolvent corporation. Upon final submission the court adjudged that the appellee (assignee) obtained a valid title to the property at the sale had, and from this judgment this appeal is prosecuted.

As said before, whether or not this judgment shall be affirmed or reversed depends upon the question of the jurisdiction of the Carter county court to order the sale at which the assignee became the purchaser of the property in dispute. It is axiomatic that two different courts cannot at the same time have jurisdiction to award a sale of the same property. Section 87, Ky. Stats., 1903, which regulates the sale of assigned property by the assignee, is as follows: "Personal property conveyed shall be sold by the assignee at private or public sale, as the court may direct; and the assignee shall have power to pass title to the same as fully as the assignor could have done at the date of the assignment. Real property (when sold at public sale) shall be sold in the same manner and upon the same terms as real property sold at decretal sale (provided, the purchaser shall have the right to pay cash and the assignee to accept cash in payment of the purchase price at any such sale), and the court may make such orders concerning the advertisement of the sale as it deems proper, and the assignee shall have power to convey and pass all the right and title to the same which the grantors in the deed of asignment had at its date. The report of sale shall be filed by the assignee within ten days after the sale, and if no exceptions are filed thereto, the

Digitized by Google

same shall be confirmed at the second regular term after it has been filed. If exceptions are filed, they shall be heard by the court and disposed of." From this it does not appear in express terms what court is empowered to direct the sale. In order to ascertain this essential fact we must refer to other sections of chapter 7, Ky. Stats., 1903, which regulate voluntary assignments. Section 75 is as follows. "The assignor, within five days from the day upon which the deed of assignment is lodged for record, shall file in the county where the assignee qualifies, to be recorded therein, a schedule, under oath, setting forth the general nature and full value of the estate assigned, together with a list of the names of his creditors and their postoffice address, the amount due to each and whether secured by lien or not. The deed of assignment shall be acknowledged by the assignor in the same manner as other deeds, and shall be recorded in the county clerk's office of the county where the assignor resides, and where the business in respect of which the same is made is carried on, and in each county where a tract of land or the greater part thereof, conveyed by the deed is situated; and the deed shall vest in the assignee the title to all the estate, real and personal, with all deeds, books and papers relating thereto belonging to the assignor at the time of making the assignment, except the property exempt by law shall not pass unless embraced in the deed, and the intent of the assignor in making the assignment, whether appearing upon the face of the deed or otherwise, shall not invalidate the deed, unless he be solvent, and it appear that the assignment was made to hinder or delay creditors." We think this section gives the county court of the county where the assignee qualifies jurisdiction of the assignee and the assigned estate. The fact that a

Digitized by Google

copy of the deed of assignment is required to be filed in the county where the business is carried on, and in every county where the assignor owns property, does not in any wise militate against this view. Section 76 provides that: "The assignee shall, when the deed is lodged for record, or within seven days thereafter, execute a bond with good security, to be approved by the county judge, conditioned for the faithful discharge of his duties as assignee, which bond shall be recorded in the county clerk's office." All of the remaining sections of the chapter speak of "the county court" without designating whether it is the county court of the county where the business is done, or the county where the property is owned, or the county where the assignee qualifies; and it may be conceded that, taking the chapter as a whole, it is singularly indefinite and inexplicit upon the important question before us. We have been cited to no case from our court which serves to guide us as to the mooted question. We are therefore forced to reach a conclusion based upon the language of the statute, without the aid of extraneous light.

The general rule is that, where a court acquires jurisdiction of a subject-matter, it is not to be construed as having lost it except by the operation of some rule or law, or as the effect of an act done by the parties in interest. Now, section 75 requires the assignee to qualify in some county, and, after this is done, it requires the assignor to record the full value of the estate assigned, with a list of the names of his creditors, their post-office address, and the amount due to each, etc. A careful examination of the whole chapter 7 ("Voluntary Assignment") establishes that the only county court which is definitely named in connection with the control of the assignee or for the disposition of the assigned property is that wherein

Digitized by Google

the assignee qualifies. It would seem therefore entirely consonant with reason that, when one court is specifically named in a chapter governing a subject such as that we have in hand, and in subsequent parts thereof are found references to "the court" or "the judge of the county court," these expressions should be construed to relate to that court which had been theretofore named; and especially when this construction will do no violence to the statute, or result in any injury to, or hardship upon, the parties affected. The fact that the statute requires the deed of assignment to be filed not only in the county where the assignee qualifies, but also in the county where the business is conducted, and in all counties where the assignor owns real property, as said before, does not militate against the view of the question of jurisdiction above expressed. The county courts or the judges of the county courts of these counties have no more to do with the deed so recorded than they would have of any other deed which the law requires to be recorded in the clerk's office of the county court. It is clear that, when the assignee qualifies before the county court that court obtains jurisdiction of him and of the estate, and there is no language in the whole chapter which seems to take from it this jurisdiction. We are therefore driven to the conclusion that in section 87, which gives jurisdiction to order a sale of the assigned estate, the expression "the court" relates alone to the county court in which the assignee qualifies.

It follows from this that the Carter county court had no jurisdiction to order the sale of the property in question, and that the appellee therefore acquired no title by his purchase under it. This conclusion obviates the necessity of discussing any other question appearing upon the record.

Digitized by Google

The judgment is reversed for proceedings consistent herewith.

CASE 19.—ACTION BY FREDRICA R. MORATH'S EXECUTOR AGAINST FERDINAND WEBERS ADMINISTRATOR AND OTHERS ON A POLICY OF LIFE INSURANCE.—December 15.

Morath's Exr. v. Weber's Admr., &c.

Appeal from Jefferson Circuit Court, Chancery Branch (2d Div.).

SAMUEL B. KIRBY, Judge.

From the judgment plaintiff and others appeal. Reversed.

1. Wills—Election to Take under Will—Estoppel—Where one who has taken out a policy on her brother's life, payable to her if she survives him, otherwise to his executor or administrator, bequeaths it to one having an insurable interest in his life, and also devises real estate to such brother for life, and on the death of testatrix he takes possession of the real estate and received the rent thereof till his death, his election to accept the devise estops his administrator to claim the proceeds of the policy.
2. Same—Condition of Bequest—Though testatrix bequeathed a policy on the life of her brother to his daughter, on condition that she pay the expenses of his last illness and of his burial, and he was killed in an accident, and was in his coffin when she learned of his death, and the cost of the funeral was paid by the executor of testatrix without notice to the daughter or opportunity to pay or request to do so, she is entitled to the legacy, less the cost of the funeral; there having been no expenses of illness, and no

Digitized by Google

time for paying the expense of the funeral being fixed by the will, so that she is entitled to a reasonable time therefor.

3. Same—Charges on Legacy—Under a will bequeathing a policy on the life of testatrix's brother to his daughter, on condition that she pay the expenses of his last illness and of his burial, and directing that the premiums on the policy be paid by her executor out of her estate, the legacy is not charged with the reimbursement of the estate for premiums paid.

LANE & HARRISON for appellant.

PROPOSITIONS AND AUTHORITIES.

1. The acceptance by a legatee of the benefits and provisions in a will in his favor and which but for the will he would not have been entitled to, precludes and estops him to make any claim inconsistent with the provisions of the will. (Warnock v. Davis, 14 Otto, 779; Clay v. Hart, 7 Dana, p. 6; Smart v. Easley, 5 J. J. Marshall, 215; Huhlein v. Huhlein, 87 Ky., 353; Story's Equity Jurisprudence, section 1077; Lee v. Charlemagne, 124 N. Y., 370; VanShack v. Leonard, 164 Ill., 602; Jarman on Wills, section 714; Peck v. Peck, 101 Ky., 403; McQuery v. Gilliland, 89 Ky., 438.

2. The policy of insurance made payable to the executors administrators or assigns of the person insured is the absolute property of the insured, and may be sold or assigned by him during his life time. (Meadows v. Meadows, 13 Ky., Law Rep., 495.

3. Where a person is the beneficiary in a policy on his own life, sells or assigns the same, and receives the purchase price therefor, such assignment will simply in law and in equity be treated as a security for the repayment to the assignee of the consideration paid by him therefor, with interest from the day of payment, and as a security for such sums as he may pay out in premiums to keep the policy alive during the life of the insured, and with interest on such payments from the date made. (Vol. 3, page 1030, Am. & Eng. Enc. of Law; Hermitage v. Miller, 76 Ala., 188; Jackson v. Anderson, 9 Ky. Law Rep., 165; Bayse v. Adams, 81 Ky., 368; Carnock v. Davis, 15 Wallace, 648; Lee v. Mutual Life, 26 Ky. Law Rep., 577; Baldwin v. Haydon, 24 Ky. Law Rep., 900; Brenham v. White, 16 Ky. Law Rep., 242; Downing v. Haefflin, 110 Pa. St., 109; Heuse v. Mutual Life, 47 Mo. Ap., 336; Schoenfelt v. Lauer, 75 Texas, 329; Cawthorn v. Perry, 76 Texas, 383.)

Digitized by Google

W. D. CRABB, LLOYD W. GATES, AND ISAAC T. WOODSON for Appellee.

LEGAL PROPOSITIONS AND AUTHORITIES.

1. One who takes out insurance upon the life of another, cannot, in the absence of authority in the charter of the insurance company change the beneficiary; and has no power to devise the insurance money to another person having no insurable interest in the life of the insured. Such a devise is void as against public policy, and does not even, when other property is devised, put the insured upon an election to forfeit the insurance money which, by the terms of the policy, is given to his administrator. (Act of 1870, now sec. 655 of Kentucky Statutes; sec. 2, article 1 of General Statutes; Ky. Masonic Mut. Life Ins. Co. v. Miller's Admr., 13 Bush, 494; Weisert v. Muehl, 81 Ky., 336; Robinson v. Duvall, 79 Ky., 83; Bacon on Benefit Societies and Insurance sec. 420-423-304; Robertson v. Met. Life Ins Co., 88 N. Y., 541; 101 Pa. St. Ill: Holland v. Taylor, 111th Ind., 135; Joseph's Admr. v. Lapp's Admr., 25 Ky. L. R., 1875, citing section 1423 of Ky. Stats.; Lee v. Mut. Life Ins. Co. of N. Y., 26 Ky. Law Rep., filed Sept. 29, 1904; Bayse v. Adams, 81 Ky., 223; Cordell v. Woodward, 96th Ky., 645; Baird v. Sharp, 17 Ky. Law Rep., 1029; Barber's Admr. v. Larue's Assignee, 106 Ky., 546; N. Y. Life Ins. Co. v. Brown's Admr., 33 Ky. Law Rep., 2070.)

2. The insurer in such cases, cannot by devise to a person having no insurable interest in the life of the insured, put the insured upon an election to take other property devised to him, in lieu of the insurance money, which was, by the terms of the policy to go to his administrator.

The doctrine of estoppel cannot be invoked in aid of a contract, or in an effort to imply a contract, which is against public policy; and the acceptance by the insured of a devise of other property does not give to the other devisees any right to compensation for the loss of insurance money which the insured had no legal right to devise; nor can the executor recover such compensation. (Dorr v. Stockdale, 19 Iowa, 273; Ferguson v. Brown, 1st Bradford N. Y., 15; Greenhood on Public Policy 5; Stone v. Wood, 16 Ill., 182, Rice v. Rice, 23 Ky. Law Rep., 635; Barman on Wills, Vol. 1., par. 389; Gardiner v. Walner, 1st. Jacob & Walker, 22; Carey v. Asken, 1st Cox 242; Brown v. First Nat. Bank at Columbus, 24 L. R. A., 211; Hutchens v. Welding, 114 Ind., 80; Perkins v. Jones, 26th Ind.; Greenhood on Public Policy, pages 2 to 6, note 3; Brown's Legal Maxims, page

Digitized by Google

729, Par., 730; 7th Waits Actions and Defenses page 92.)

3. An executor of a person who took out insurance for the benefit of the estate of another, and who paid the premiums on such insurance during her own life, and provided by will for the continued payment of such premiums during the life of the insured, should not be held to have acquired by virtue of such testamentary provision any interest in the policy of insurance, especially when the insurer attempts in the will to devise the insurance money to persons who had no insurable interest in the life of the insured; nor in such case should the executor be allowed to recover premiums paid under the directions of the will.

Even if so allowed to recover premiums on an amended petition filed in the suit prosecuted to recover the proceeds of the policy the executor should not have been adjudged his general costs.

4. A recovery in the name of an executor and trustee of an estate for the sum of $186.52 funeral expenses of a dead devisee, already paid (to him the executor) by another devisee, is erroneous, in the absence of allegation or proof showing the authority of the executor or trustee to sue for the funeral expense money, in behalf of the party so paying the same.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

On December 1, 1894, Fredrica R. Morath obtained of the New York Life Insurance Company a policy of insurance on the life of her brother, Ferdinand Weber, for the sum of $1,000, payable to her if she survived the insured, otherwise to his executors, administrators, or assigns, upon the receipt and approval by the company of the proofs of his death, provided the policy should then be in force. The annual premium on the policy was $37.50, payable December 1st each year during the life of the insured, and the first premium was paid by Frederica R. Morath December 1, 1894, at which time the policy was delivered to her. Frederica R. Morath died in Jefferson county in March, 1895, testate. Her will, which had been written January 1, 1895, was admitted

Digitized by Google

to probate by the Jefferson county court, and at the same time the appellant, H. C. Hess, named in the will as executor, duly qualified in that capacity. The will contains the following provision: "I direct that the premiums on the policy of insurance in my favor upon the life of my brother, Ferdinand Weber, be regularly paid out of my estate, and by my executors, and on the death of my brother, Ferdinand Weber, the money realized from said policy of insurance will be paid over to and receipt taken therefor from Mary Miller, nee Weber, the daughter of my brother Ferdinand Weber. This bequest is upon the express condition that the said Mary Miller in the judgment of the executors of this will takes good care of and provides for her father, Ferdinand Weber, during his last illness and pays the expense thereof, as well as his funeral expenses. But in the event that the said Mary Miller fails to comply with the above condition, then the said sum so realized from said insurance is to be, when collected, paid out by my said executors to either my daughter, Theresa Haag, or to my brother, Henry Weber, whichever one of the two last named takes good care of and provides for my brother, Ferdinand Weber, during his last illness and pays the expenses thereof, as well as his funeral expenses, and in the event that my daughter, Theresa Haag, takes good care of and provides for my brother, Ferdinand Weber, during his last illness and pays the expenses thereof, as well as his funeral expenses, and thereby becomes entitled to said insurance money, then and in that event it is my wish and will that said insurance money is to be held by H. C. Hess, in trust for the sole, separate and exclusive use of my daughter, Theresa Haag, free from the control and marital rights of any husband she now has, or may hereafter have, and to be invested, controlled and managed by

Digitized by Google

H. C. Hess, for the sole, separate and exclusive use of my said daughter for and during the term of her natural life with remainder to her children, and in the event that the said Mary Miller does not, nor does the said Henry Weber, nor Theresa Haag, take good care of or provide for my brother, Ferdinand Weber, during his last illness, nor pay the expense thereof, nor the expenses of his funeral, then and in that event the said insurance money is to pass under the succeeding clause of this will." That clause of the will above referred to provides that after certain specific devises and bequests all the residue of the testatrix's estate, real and personal, shall vest in the executor of her will, in trust for the separate use of her daughter and only child, Theresa Haag, for life, with remainder to the children of her body, of whom she has seven, all infants. The will also contains this devise: "I will to my brother, Ferdinand Weber, for and during the term of his natural life and for his maintenance and support, the improvements and buildings on and the rear half of the lot of land on the east side of Jackson street, between Chestnut and Gray streets."

Upon the death of Frederica R. Morath, her brother, Ferdinand Weber, took possession of the real estate devised him and received the rents thereof until his death in July, 1904, which resulted from his being run over by a street car. As there was no protracted illness preceding his death, no expense was incurred by Theresa Haag, Mary Miller, or Henry Weber on that account, but Theresa Haag caused the executor of her mother's will to defray his burial expenses, amounting to $186,50, which sum he paid out of the income arising from the estate devised him in trust by the will of Frederica R. Morath for the use of Theresa Haag. The executor, as

Digitized by Google

directed by the will of Frederica R. Morath, annually paid to the New York Life Insurance Company the premium of $37.50 on the policy of insurance issued upon the life of Ferdinand Weber until the death of the insured. The aggregate amount of the premiums so paid, with interest, was $450. Soon after the death of Ferdinand Weber the executor prepared the necessary proof thereof, which he presented to the insurance company, and demanded payment of the amount of the policy on Weber's life. The company, however, declined to accede to this demand because the insur ance was about the same time demanded of it by appellee, A. M. Sea, Jr., as administrator of the estate of Ferdinand Weber. Mary Miller, the only child of Ferdinand Weber, and his sole heir at law, also notified the insurance company that she claimed the proceeds of the policy on her father's life. The executor of the will of Frederica R. Morath thereupon instituted this action against the New York Life Insurance Company to recover the amount of the policy in question. A. M. Sea, as administrator of the estate of Ferdinand Weber, deceased, Mary Miller, Henry Weber, Theresa Haag, and the seven children of the latter, were all made defendants. The insurance company by answer admitted its liability for the amount of the policy and paid the money into court, asking that the several claimants be required to litigate their rights to same, which was done by the filing of appropriate pleadings on the part of each, followed by the taking of proof in the form of depositions. Upon final hearing the chancellor entered judgment, distributing the proceeds of the policy by appropriating $636.50 thereof to the executor of Frederica R. Morath in satisfaction of the premiums paid by him on the policy during the life of Ferdinand Weber, and interest on same, and the burial expenses

Digitized by Google

of the latter, also the additional sum of $24.85 to pay the costs of the action, which left of the proceeds of the policy $338.65, and this sum was directed to be paid to A. M. Sea, Jr., administrator of the estate of Ferdinand Weber, deceased. The appellants, H. C. Hess, executor of the will of Frederica R. Morath, and Theresa Haag and her children, excepted to the judgment because it did not direct the payment to the executor of the entire proceeds of the policy in controversy, and it was likewise excepted to by appellees A. M. Sea, Jr., administrator of the estate of Ferdinand Weber, and Mary Miller, because it directed the payment of any part of the proceeds of the policy to the executor of the will of Frederica R. Morath, and all the parties named appealed.

It is contended by appellants that the acceptance by Ferdinand Weber of the devise contained in the will of Frederica R. Morath, deceased, and his enjoyment thereof until his death, invested the executor with absolute title to the proceeds of the policy in question for the use and benefit of Theresa Haag, and that the legal effect of such election on his part operates as an estoppel to the claim made by his administrator and heir-at-law to the proceeds of the policy. Ordinarily one who has accepted a benefit under a will cannot be allowed to disappoint it, but must concede full effect to the dispositions thereof; and this rule is approved by the numerous authorities cited by appellant's counsel, some of which apply to a state of case where the beneficiary of the policy elects to take under the will. If it be conceded that Mrs. Morath could not by will dispose of the policy on her brother's life to one who had not an insurable interest in his life, and that by reason thereof the devise of the policy to her own daughter was void, as the will first devised the policy to Mary Miller, the daughter

Digitized by Google

of the insured, who certainly had an insurable interest in his life, if this devise can be upheld, beyond question the election of the insured to accept the devise under his sister's will would operate as an estoppel to the claim made by his administfator to the proceeds of the policy, though such an election might not operate as an estoppel as to one having no insurable interest in the life of his intestate, because to allow it to go to the latter would be violative of the public policy of the State. The policy provides that it should be paid to Mrs. Morath if she survives her brother, the insured, but otherwise to his estate or assigns. When the insured elected to take under Mrs. Morath's will, he was estopped to deny its full effect in every other particular, unless to do so would be to violate some statute or the public policy of the State.

It will be conceded that to allow the assignment of a policy to one having no insurable interest in the life of an insured would be against public policy, but that question cannot arise in this case if the devise of the policy by the will of Mrs. Morath to Mrs. Miller, the daughter of the insured, is sustained; for it would be such an assignment as the insured himself might legally have made, and, if so, the personal representative of the insured ought to be estopped from denying the validity of such an assignment of the policy, because it is in no sense in contravention of the public policy of the State. Mrs. Morath, having an insurable interest in the life of her brother, effected a valid contract of insurance on his life for her own benefit. She kept it alive, as did her estate after her death, for several years. She provided in her will, in effect, that he should have certain of her estate upon the condition that he yield to her a part of his own estate, viz.. the benefit of his life insurance for his own daughter, who had an insurable interest in his

Digitized by Google

life. Such a disposition of the policy by Mrs. Morath, as she was survived by the insured, would have passed nothing to her devisee, if the insured had declined to take the devise made him by her will, but he did not decline it, and, having accepted it, his personal representative cannot assert claim to the policy as against Mrs. Miller holding under the same will and having had an insurable interest in the life of the insured. Smart v. Easley, 5 J. J. Marsh, 215; Morrison v. Fletcher, 119 Ky. 488, 84 S. W. 548, 27 Ky. Law Rep. 124; Bigelow on Estoppel, 503, 504; 1 Pom. Eq. section 742; Huhlein v. Huhlein, 87 Ky. 247, 7. S. W. 547, 10 Ky. Law Rep. 107. What are Mrs. Miller's rights under the will of her aunt, Mrs. Morath? The policy was bequeathed her upon the condition that she pay the expense of her father's last illness and those attending his burial. As his death occurred suddenly, the only expense that could have been defrayed by her was that of his burial. According to the evidence she went to see his remains and to attend the burial as soon as notified of his death. She found his body shrouded and in the coffin. After the burial the cost thereof was paid by the executor of her aunt's will without notice to her. She had no opportunity to pay it, and was not requested to do so. The will does not fix the time for her paying the expense of her father's burial, and she therefore had a reasonable time to do so, and may do so out of the proceeds of the policy if adjudged entitled to it under her aunt's will. The executor of the will of Frederica Morath is entitled to be repaid out of the proceeds of the policy the amount of Ferdinand Weber's burial expenses paid by him, which is admitted to be $186.50, but no good reason has been suggested for his being reimbursed out of the proceeds of the policy, the premiums which by direction of Mrs. Morath's will

Digitized by Google

be paid thereon to the insurance company. The will bequeaths the policy or its proceeds to Mrs. Miller upon the condition that she pay the burial expenses of the insured, and also any expense that might be incurred by or on account of his illness, but no other condition is imposed by its provisions. On the contrary, it clearly manifests the purpose of the testatrix to provide against a lapsing of the policy by directing the executor to pay the premiums out of her estate. This requirement was prompted by the same affection that provided a support out of the donor's estate for her aged and afflicted brother, and but for which he would have been a burden upon his daughter, Mrs. Miller, who was already charged with the support of her mother, from whom the father had separated. If Mrs. Morath had contemplated or intended that her estate should be reimbursed by her niece for the premiums the executor was directed to pay on the policy, it would have been both natural and reasonable that the requirement to that effect would have been inserted in her will along with those that were intended to exact of the niece the payment of the expenses of her father's illness and burial. The fact that Mrs. Miller was by her father's sudden and accidental death relieved of any expense resulting from a last illness should not invalidate the bequest of the insurance money to her, if one of the conditions imposed by the will was left to be performed and may yet be performed by her, viz., the payment of her father's burial expenses. What difference can it make that they were first paid by the executor of the will, if she repays it to the executor, and why not out of the proceeds of the policy as well as with any other money of her own? Will it not be sufficient and as much a compliance with the condition imposed by the will as if she had paid it directly to the undertaker by whom

Digitized by Google

her father's remains were interred? Its payment by her is all that is required by the will to entitle her to the insurance money, and we are firmly of the opinion that in adjudging her entitled to the proceeds of the policy we but carry out the wishes of her aunt as generously expressed in the will.

Judgment reversed on both the original and cross-appeal, and cause remanded for the entering of such a decree as will conform to this opinion.

CASE 20—ACTION BY MARY A. FOX AND OTHERS AGAINST A. B. CORNETT TO QUIET TITLE TO LAND.—May 1, 1906.

Fox, &c., v. Cornett

Appeal from Harlan Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for defendant. Plaintiffs appeal. Affirmed.

1. Public Lands—Release and Quitclaim—Operation and Effect.—A release and quitclaim by a patentee of public lands to certain named grantees and all others holding older titles of all his interest acquired by a patent in 1853, in so far as it covers land patented, held, or claimed by the parties of the second part under title older than the patent, is of no avail to one who is not shown to have been in possession of any land covered by the patent and against whom is set up a patent issued in 1846 to the patentee who executed the release.
2. Same—Patents—Validity—Description of Land.—A patent of public lands, definite in its description of boundaries, is

Digitized by Google

not void because it fails to refer to and exclude older patents included in it; those portions being excluded by operation of law.

3. Quieting Title—Title to Sustain Action—Possession.—Where a claim to have title quieted is asserted by a defendant as a counterclaim, and there has been an effort on the part of the person against whom the claim is asserted to deprive the defendants of his title by converting it to his own use, Ky. Stat., 1903, section 11, authorizing suit to quiet title by an owner in possession, does not apply, so as to require proof of possession by the defendant.

FOX & JACKSON, CHAS. C. FOX, AND W. F. HALL for Appellants.

H. C. CLAY for Appellee.

(No briefs—record misplaced.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

This suit was brought by appellants, plaintiffs below, to quiet the title to an undivided one-third of 925 acres of land in Harlan county, to which they asserted title by virtue of a purchase from the heirs of Hezekiah Branson, who obtained a patent for this body of land in 1851, under a survey made in 1848. The deed conveying this interest was executed in 1889 and recorded in 1890. Appellee filed an answer and counter-claim, traversing the petition, and alleging in the counter-claim that he was the owner of and in the posession of 421 acres of the 925 acres described in the petition. The part that he asserted title to included the land conveyed to appellants by the Bransom heirs. "He prayed that the plaintiff's petition be dismissed, that his title to said land be quieted, that plaintiff's be required to release to defendants any and all claims they have to said land herein described, and for costs and all proper relief."

Digitized by Google

Appellee's title to the land in controversy rests on a patent issued by the commonwealth to Boyd Dickinson, in 1846, for 17,200 acres of land; the patent being based on a survey made in 1845. In a reply appellants averred that in September, 1853, Dickinson, the patentee, released and quit-claimed to Hezekiah Bransom and others all interest he had in the land to which they assert title or ownership. The grantees in this deed are Hezekiah Bransom and 25 other named persons, "and all other citizens of Harlan county whose titles are older than Boyd Dickinson's patent, or who hold bona fide improvement rights under the laws of Kentucky, before the survey of Boyd Dickinson;" and it further provides "that the said Boyd Dickinson, for and in consideration of the sum of one dollar, to him in hand paid, the receipt whereof is hereby acknowledged, has bargained, sold, and by these presents doth bargain, sell, release, and forever quit-claim and confirm unto the party of the second part all the right, title, and interest which the said Boyd Dickinson acquired by a large survey of land made by him in the county of Harlan and State of Kentucky, on the waters of Cumberland river and tributaries, some years ago, and which he obtained on the 9th of October, 1853, and for which he obtained a patent from the commonwealth of Kentucky, so far as said patent and survey covers or conflicts with any land patented, held, or claimed by any and all of the party of the second part to this deed, which are older than the patent to this grantor."

Appellee by rejoinder controverted the allegations in respect to this deed, and denied that any deed affecting the land in controversy had ever been made. Pending this action, the heirs of Hezekiah Bransom filed their petition to be made parties and asserted title to the other two-thirds of the 925 acres, asking

Digitized by Google

that the title thereto be quieted, but on their motion and before a submission of the case their petition was withdrawn. Proof was taken by the parties, and the court adjudged "that the defendant in the original action and plaintiff in the counter-claim, A. B. Cornett, is, and was at the institution of this action, the owner and in the actual possession of the land described in his answer and counter-claim, * * * and that the title to said land be forever quieted against the claims of plaintiffs, and the plaintiffs are ordered to release unto A. B. Cornett all claim that they or either of them had or have to said land, or any part of same."

It appears from the evidence in the case that appellants had never been in possession of the land claimed by them, and that the 421 acres adjudged by the court to appellee lies within the lines of the 17,200 acres for which a patent was issued to Dickinson in 1846. Appellants assail the validity of the patent to Dickinson, and also rely on the deed of release before mentioned. This deed of release, which appellee denies was ever made, and attacks the sufficiency of for reasons not here necessary to mention, does not aid appellant, because there is no evidence that Hezekiah Bransom at the time this deed was made was, or ever had been, in possession of any part of the land embraced in this patent. The deed also shows on its face that it relates to land for which Dickinson obtained a patent October 9, 1853, while the Dickinson patent, relied on in this case by appellee, was issued in 1846. The patent issued to Dickinson in 1846 for this 17,200 acres of land does not mention or exclude any prior patents for land embraced within its boundary, although the surveyor whose evidence was taken for appellee, and who files a map of the Dickinson patent as a part of his deposition, testifies that there

Digitized by Google

were several prior patents issued for land within the Dickinson boundary. For this reason appellants insist that the Dickinson patent is void; but in our opinion the failure of the Dickinson patent to mention or describe prior grants within the boundary does not render it void. The exterior lines of this patent are well described, and the surveyor testifies that he found no difficulty in locating them, and that the survey was unusually accurate to cover so large a boundary. The patent to Dickinson did not in and of itself affect the validity of prior patents within the boundary, and the appellee testified that he did not assert any claim to land within the boundary which is covered by patents of an older date.

In Hall v. Martin, 89 Ky. 9, 11 Ky. Law Rep. 241, 11 S. W. 953, the appellee claimed under a patent to McNew, the boundaries of which were definitely set forth by courses and distances, as are the boundaries of the Dickinson patent. The McNew patent excluded the land contained in prior grants, of which there were two. In that case, as in this, it was contended that the McNew patent was void because it failed to describe the excluded prior grants. The court in answer to this said: "There is no claim by the appellee of his right to recover any of the land held under the elder grants; but the controversy is with the junior patentees, and the question of fact arising between these conflicting claims we will not consider, as the case must go back for another trial. The exclusions or elder grants within the boundary of the McNew patent, under which the appellee claims, are not identified or mentioned in the patent to McNew—neither described by boundary nor by the name of the patentee or grantee. The McNew patent proceeds to define the specific boundaries of the patent, as much so as the courses and

Digitized by Google

distances in an ordinary deed, the number of acres as being 1,248, and excluding therefrom the number of acres contained in prior grants. * * * If in every patent that contains exclusions it is necessary to describe the grant excluded, or to so identify it, either as to the number of acres, the boundary, or by giving the name of the grantee or the patentee of the elder grant, then the patent to McNew in this case is void, as it is silent as to the boundary, the number of acres, or the owners of the excluded land. We perceive no reason why such a grant should be held void, or the party under such a patent denied the right of showing title in himself to all but the exclusions contained in the grant. * * * If McNew had made the survey as accurate, and as specific, or even much less so than his patent shows, without mentioning any elder grant as being within his boundary, it will not be pretended that his patent would be void. The law would then exclude from his patent that which was paramount in title, and that which he has in this case excluded by the terms of his grant."

In the case at bar, although the patent does not mention prior grants, it is conceded that prior grants are contained within the boundary, and the law will exclude from the operation of the Dickerson patent the prior grants. There is some question as to whether or not appellee was in possession of the land in controversy, and it is insisted that, as his cause of action asserted in the counterclaim is for the purpose of quieting the title to the land, both the legal title and the possession are necessary under the provisions of section 11 of the Kentucky Statutes of 1903, and the decisions of this court involving this question. Cornelison v. Fouschee, 101 Ky., 257, 19 Ky. Law Rep., 417, 40 S. W., 680; Packard v. Beaver

Digitized by Google

Valley Land & Mining Co., 96 Ky., 249, 16 Ky. Law Rep., 451, 28 S. W., 779. But the principle laid down in these cases is not here applicable for two reasons: The appellant brought this suit to have the title to this land quieted, and the appellee by his counterclaim asserted ownership to this land and asked that his title to it be quieted, tendering an issue involving the question of superior title, and it was competent, as ruled in Magowan v. Branham, 95 Ky., 581, 16 Ky. Law Rep., 233, 26 S. W., 803, for the court to try and determine it; and for the further reason that this was an effort on the part of appellant to deprive appellee of his title to the property by converting same to his own use. It is a wrongful seizure of his title that is the foundation of his action, and, as held in Herr v. Martin, 90 Ky., 377, 12 Ky. Law Rep., 359, 14 S. W., 356, in a case like this, a party can maintain his action although not in the actual possession of the property.

Several minor defects are pointed out in the chain of title by which appellee holds this land, but we do not deem it necessary to discuss them. It is sufficient to say that in our opinion they do not affect the validity of appellees' title in this controversy with appellant.

The judgment is affirmed.

Digitized by Google

CASE 21—ACTION BY THOMAS MITCHELL AGAINST THE SOUTHERN RAILWAY COMPANY TO RECOVER A BALANCE DUE ON A CONTRACT.—May 6, 1903 .

Mitchell v. Southern Railway Company

Appeal from Jefferson Circuit Court. C. P. Branch (Second Division).

MATT O'DOHERTY, Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

Indemnity—Construction of Contract—Liability For Accidents.—Plaintiff contracted to do certain work in the construction of a tunnel for defendant, agreeing to save defendant harmless from "all casualties or accidents resulting to employes engaged in the work contemplated under this contract, or to any third person who may be in any manner injured or damaged" by him or his servants. By the specifications, which were made a part of the contract, plaintiff was made responsible for all damages "to the work * * * persons and property, which could have been avoided by the exercise of proper care and vigilance on his part." Held that, in view of the clause in the specification, the contract made plaintiff liable only for casualties and accidents produced by his own negligence or that of his servants, and not for accidents that were caused by defendant's negligence.

HELM, BRUCE & HELM Attorneys for Appellant.

POINTS AND AUTHORITIES CITED.

1. A contract will not be construed to require one person to pay another's damages resulting from the latter's own negligence unless the purpose of the parties to make such a contract is so unmistakably plain that this construction cannot be avoided. (Perkins v. New York Central R. Co., 24 N. Y. 206; Mynard

Digitized by Google

v. Syracuse, &c. R. Co., 71 N. Y., 183; New Jersey Steam Navigation Co. v. Merchants Bank, 6 How., 344.)

2. "Punctuation is the most fallible standard by which to interpret a writing." (Ewing v. Burnett, 11 Peters, 41; Succession of Allen, 48 La. Ann., 1036, (55 Am. St. Reps., 295); 17 Am. & Eng. Ency. of Law (2 Ed.) 20.)

3. Independent Contractors. (Robinson v. Webb, 11 Bush, 464.)

HUMPHREY, BURNETT & HUMPHREY for Appellee.

POINTS AND AUTHORITIES.

Kansas City, Memphis & Birmingham Ry. v. Southern Railway News Co., 151 Mo., 373; (S. C., 52 S. W., 205); Casualty Insurance Company case, 82 Md., 575, 577; (S. C., 34 Atl., 778); Trenton R. R. v. Guarantor's Liability Co., 60 N. J. Law, 246; (S. C., 37 Atl., 609); Baltimore & Ohio Southwestern R. R. v. Voigt, 176 U. S., 498.

OPINION OF THE COURT BY JUDGE PAYNTER—Reversing.

On the 9th day of April, 1901, the appellant, Mitchell, and the defendant, Southern Railway Company, entered into a contract by which Mitchell was to do certain work in the construction of a tunnel on the line of the appellee's railway in Indiana, according to the specifications made a part of the contract. The specifications contained the following provision:

"The contractor takes all risks in regard to accidents and casualities of all kinds which may occur during the progress of the work and to be held responsible for all damages to work as well as to the machinery, rolling stock, persons and property, which could have been avoided by the exercise of proper care and viligance on his part."

Among the provisions of the contract was the following:

"The contractor hereby agrees to give bond, same

Digitized by Google

secured by some reliable surety company, accepted by the Railway Company, in the sum of fifteen thousand dollars ($15,000) for the faithful performance of the within contract, and for the purpose of indemnifying the Railway Company for the work contemplated under this contract, and for all cost accruing to said Railway Company in defending any and all liens, of whatsoever nature, enforced for labor and material under this contract.

"Said contractor further agrees to indemnify and save harmless said Railway Company from all casualities or accidents resulting to employes engaged in the work contemplated under this contract, or to any third person who may be in any manner injured or damaged by the said contractor, his servants or agents, in the performance of this contract."

The appellant entered upon and completed the work under the contract, which has been accepted, and the contract price has been paid, except $355.95, which appellee withheld from the appellant on account of the following facts, namely: During the progress of the work on the tunnel, Mills Buxton received an injury, which was due entirely to the negligence of the appellee in the manner of its operation of a railway train through the tunnel whilst Buxton was working as an employe of plaintiff in the execution of the work required by the contract. Neither the plaintiff nor any of his employes in the least degree contributed to the injury. The train which inflicted it was not used by the appellant or for him, but was one which was operated entirely by the appellee, and wholly within its control. Buxton instituted a suit against the appellee to recover damages for the injury he had received. The suit was compromised for $355.95, and it is conceded that the compromise and

Digitized by Google

settlement was a prudent one for the appellee to make.

The question here for our consideration is, did the appellee have the right to withhold the amount which it paid Buxton out of the contract price of the work? The answer to this question depends upon the terms of the contract into which the parties entered. It is the contention of the appellee that the appellant indemnified it against losses occasioned by casualities and accidents resulting in the injury of the appellant's employes engaged in the performance of the work contemplated under the contract, notwithstanding that the injury might be inflicted solely by its own negligence. For the appellant it is insisted that it was not the intention that he should indemnify appellee against its own negligence, but that he was indemnifying against losses which might result to it by reason of his or his employes' conduct in the prosecution of the work. In construing a contract, it should be the purpose of a court to ascertain, if possible, the intention of the parties to it. To do so, it is sometimes not only important for the court to consider the language employed in the contract, but the circumstances surrounding the parties, and the object in view which induced the making of it. It is not proper, in construing a contract, for a court to seize upon some expression in it, and allow that to control, in disregard of other provisions of it. The whole of the contract should be read. When we consider the work to be done by the appellant was to yield him but a few thousand dollars in gross, and that his profits, if large, considering the work to be done, would necessarily be small in amount, it is improbable that he would undertake to indemnify the appellee against losses occasioned by its own acts of negligence. Especially is it so when one act of negligence by the

Digitized by Google

appellee might not only sweep away the profits derived from the work, but his entire fortune. Such an interpretation should not be given a contract that would make the appellant responsible for the consequence of a negligent act of the appellee unless no other meaning can be ascribed to it. If a doubt existed as to its meaning, the court would resolve that doubt against the contention that the contract was intended to indemnify appellee against its own negligence. Every presumption is against such intention. While the precise question was not under consideration in cases to which we now allude, yet we think the rule enunciated in them applies equally well to this case. In Perkins v. New York Central Railroad Company, 24 N. Y., 206, 82 Am. Dec., 281, the court said: "A party who claims exemption from liability for the negligence of his servants or agents must undoubtedly base his claim upon the express words of his contract. It will not be presumed in his favor." In Mynard, etc., v. Syracuse, etc., R. Co., 71 N. Y., 183, 27 Am. Rep., 28, the court said: "When general words may operate without including the negligence of the carrier or his servants, it will not be presumed that it was intended to include it. Every presumption is against an intention to contract for immunity for not exercising ordinary diligence in the transaction of any business, and hence the general rule is that contracts will not be so construed, unless expressed in unequivocal terms."

To read the contract in question without observing the punctuation, we at once conclude that it was not the intention of the parties that the appellee was to be indemnified against its own acts of negligence. If we read it with a comma after the words "to any third person," then it would read as follows: "Said

Digitized by Google

contractor further agrees to indemnify and save harmless said Railway Company from all casualities or accidents resulting to employes engaged in the work contemplated under this contract, or to any third person, who may be in any manner injured or damaged by the said contractor, his servants or agents, in the performance of this contract." To thus read it shows that the indemnity to the appellee is against the consequences of the acts of the contractor, his servants or agents, in the performance of the contract. The United States Supreme Court, in Ewing v. Burnet, 11 Pet., 54, 9 L. Ed., 624, said: "Punctuation is a most fallible standard by which to interpret a writing. It may be resorted to when all other means fail. But the court will first take the instrument by its four corners, in order to ascertain its true meaning. If that is apparent upon judicially inspecting the whole, the punctuation will not be suffered to change it." When the court takes the instrument by its four corners to ascertain its meaning, and reads it without punctuation, the same conclusion is reached as to the intention of the parties as is reached when the comma is placed after the words "to any third person." In our opinion, if for no other reason, the comma should be so placed, because the language in the specifications which we have quoted above showed that the appellant was to be responsible only for damages which might have been avoided by the exercise of proper care on his part. By the terms of the specifications (and it must be read in connection with the contract, as it is made part of it by express terms), the appellant is made responsible for "accidents and casualities of all kinds which may occur during the progress of the work and will be held responsible for all damages to the work, as well as to the machinery, rolling stock, per-

Digitized by Google

sons and property, which could have been avoided by the exercise of proper care and vigilance on his part." The word "persons" would comprehend all the appellant's agents, servants, and employes, and "third persons." If he is to be responsible for damages to his employes and third persons which could have been avoided by the exercise of proper care and vigilance on his part, the converse of the proposition is true—that he is not to be held responsible for damages to his employes or third persons which were not the result of the want of his proper care and vigilance. To read this clause in the specification in connection with the clause in the contract, it is readily seen that the indemnity to appellee against damages to persons by accidents or casualities was such as were produced by the acts of the appellant, his servants or agents. The appellee did not have the right to withhold the amount in controversy.

The judgment is reversed for proceedings consistent with this opinion.

Digitized by Google

CASE 22.—ACTION BY WILLIAM B. PHYSIOC AGAINST THE SOUTH COVINGTON & CINCINNATI STREET RY. CO., FOR DAMAGES FOR PERSONAL INJURY.—March 23, 1906.

South Cov. & Cin. St. Ry. Co. v. Physioc

Appeal from Campbell Circuit Court.

ALBERT S. BERRY, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

Carriers—Street Railways—Injuries to Passenger—Negligence—Contributory Negligence—Evidence—Where plaintiff boarded a crowded street car, and stood on the steps of the platform thereof while the same was running rapidly and approaching a sharp curve, of whose existence plaintiff had knowledge, it was contributory negligence on his part to release, for the purpose of paying his fare, his hold on the handhold, precluding him from maintaining an action for injuries received through being thrown from the platform as the car rounded the curve.

L. J. CRAWFORD for appellant.

PROPOSITIONS ADVANCED AND AUTHORITIES CITED.

1. The court erred in overruling demurrer to petition.

(a) Things complained of not alleged to have been unknown to appellee.

(b) Curve and lurch not alleged to have been unnecessary, avoidable or unusual. (L. & N. R. R. Co. v. Morris, 23 R., 448.)

2. Reply is insufficient. Does not deny negligence on appellee's part, contains only legal conclusions, and negation of a negative.

3. Error in overruling motion for judgment on pleading.

4. Error in overruling motion for peremptory instruction.

(a) Appellant not negligent.

Digitized by Google

(b) Appellee guilty of contributory negligence.

5. Verdict excessive and contrary to evidence.

6. Error in overruling motion for judgment non obstante verdicto.

7. Instructions erroneous.

(a) Confusing and misleading.

(b) No. 1 not complete and refers to petition.

(c) Converse of No. 1 not given.

(d) No. 2 calls special attention to certain fact, giving them undue prominence. This is error. See: (L. & N. R. R. Co. v. Banks, 17 R., 1065; Moran v. Higgins, 19 R., 456; Jones v. Jones, 102 Ky., 450; Taulbee v. Moore, 21 R., 378; Times Dist'g Co. v. Zehnder, 21 R., 753; Traveler's Ins. Co. v. Clarke, 22, R., 902; Bowling Green Stone Co. v. Capsha, 23 R., 945.)

(e) By No. 3, it is intimated that jury may consider things not mentioned in petition or instruction and gives undue prominence to certain facts.

(f) "Negligent," "negligence," "contributory negligence," not defined, etc. Error—See authorities next below.

(g) Care not limited to "that ordinarily exercised by ordinarily prudent persons." Error—See: (Sullivan's Adm'r v. Louisville Bridge Co., 9 Bush, 81; Richmond & Lexington Turnpike Co. v. Foley, 5 Ky. Law Rep., 425; Bogenschutz v. Smith, 84 Ky., 330 to 343; Louisville Ry. Co. v. Park, 96 Ky., 580; Louisville Railway Co. v. Weams, 80 Ky., 420; Beaver, &c., v. Bowen, 26 Ky. Law Rep., 291 to 293; Davis v. Paducah Ry. & Light Co., 24 Ky. Law Rep., 135 to 137; Houghton v. Louisville Ry. Co., 26 Ky. Law Rep., 393; South Cov. & Cin. St. Ry. Co. v. Riegler's adm'r, 26 Ky. Law Rep., 666 to 669; Ky. Central R. R. Co. v. Dills, 4 Bush, 593 to 596.)

(h) Erroneous instruction not cured by instruction "A," which relates only to contributory negligence.

HULKER & HULKER and THOS. L. MICHIE for appellee.

1. Appellee was accepted as a passenger and his fare had been collected while standing on the platform by reason of the car being overcrowded, and appellant had its election to accept him as a passenger in that position, and, having so accepted him it was its duty to use care in the operation of the car commensurate with the situation and with its knowledge of appellees position.

2. The negligence of appellee consisted in running its car over a sharp curve at a rapid and unreduced speed and in having its curves so constructed that the violence of a sudden lurch of the car at that point was unusual.

Digitized by Google

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

On the 24th day of March, 1903, the appellee, who lives in Newport, Ky., boarded a street car of the appellant company which was so crowded that he remained standing on the steps of the platform, and held on with his right hand to an upright iron bar fastened to the car, called in the record a "handhold," in order to avoid falling or being thrown off. While he was riding in this position, the conductor, who was inside the car when he boarded it, came to the rear door and called for his fare. Appellee had placed his fare in a pocket on the right side of his overcoat, and in order to get it out, released his grasp upon the "handhold," and, as he did so, the car, which was going at a rapid rate of speed, reached a curve, in rounding which appellant was thrown, or forced to jump, from the platform to the ground, by the lurching motion incident to the sudden change of direction, which so jarred him that he suffered a rupture, and was thereby permanently injured. Although the car stopped for him, he did not again get aboard but waited and took another, and went to his place of business in Cincinnati. To recover damages for the injury received as above narrated, he instituted this action in the Campbell circuit court, alleging that the accident was due to the negligence of the appellant company in the operation of its car. The essentials of his cause of action are contained in the following excerpt from the petition: "Plaintiff says that he was injured as aforesaid by and through the wrongful and willful neglect and default of the defendant in this, to-wit, that the defendant wrongfully, willfully, and negligently constructed and

Digitized by Google

maintained its street railway track at and over the intersection of Third street and Washington avenue with a curve which was liable to cause its said street car to lurch in going over said curve, and also that the said defendant wrongfully, willfully, and negligently ran its said car over the said curve with great and unusual speed, whereby the said street car was caused to lurch in passing over said curve, and also that the said defendant wrongfully, willfully, and negligently caused, suffered, and permitted its said street car upon which plaintiff was a passenger as aforesaid to become and to remain crowded with passengers so that plaintiff was compelled to stand and remain upon the rear platform of the said car while passing around the said curve. Whereby, by and through the neglect and default of the defendant as hereinbefore stated, the plaintiff was thrown from the said car, and thereby injured as hereinbefore stated." The appellant company placed in issue all of the allegations of the petition, and pleaded contributory negligence on the part of the appellee, and the issues were completed by reply denying the affirmative allegations. A trial resulted in a verdict and judgment for the appellee (plaintiff) in the sum of $5,000, from which this appeal is prosecuted.

On the trial of the case two grounds of negligence were relied on: First, that the appellant company permitted its rear platform to become so overcrowded that the appellee was compelled to remain standing thereon; and, second, that it was propelled around the curve at so rapid a rate that he was thrown from his position on the platform by the resulting lurch when the car suddenly changed its direction. When the appellee took passage on the car he knew of its crowded condition, and boarded it voluntarily in preference to waiting for one less

Digitized by Google

crowded. In his evidence he made the following statement with reference to his position on the platform, and the manner and cause of his injury: "I hailed the car there this morning, and it was very crowded, and the nearest I could get on was to hang on with my toes on the platform; and I stood in that position and rode facing about southwest. I was standing about this position (illustrating), holding on an upright bar that goes up and down the body of the car; and when the car was going at a pretty rapid gait, faster than ever I seen it; and I just thought at the time that the conductor was behind, because he had not got his fares up then. I usually can get my fare in as soon as I get on the car at that point; and he touched me for my fare as the car was going down the grade there from Monmouth street to this curve, * * * and as we approached this curve going fast the conductor was inside the car, and he came to the door, and he asked me for my fare. I released my hold and got the change out of my ticket pocket, overcoat pocket, and as I reached it to him and he got it, this car hit the curve and it twisted me, throwed me in that direction; and I had run across pretty near the length of this room before I recovered my equilibrium to stand on my feet. Of course I felt angry about it. I might have swore a little, but I would not get back on the car. I walked the other square to the bridge, and took another car." On cross-examination he said, in answer to the question, "And knowing that to be the case, standing by the edge of the platform, did you release your hold upon the upright bar?" "A. Well, I was cognizant of the fact that we were on or near that curve. I was facing in the direction that I could not see back of me, and I didn't know that we were at that point. If I had seen that we were coming up to that danger

Digitized by Google

there, I would have protected myself, I would not have paid my fare, I would not have let go, I would have taken care of myself, because I think that is every man's position, to take care of himself. Q. How could you have protected yourself? A. I could have held on tighter. I know very well it could not have swung me off if I had held to it because I am strong enough to hold my weight up." Again: "Q. In what other way could you have protected yourself besides holding with your right hand? A. I don't know any other way only if I had retained hold of that bar till the car had passed that curve I know I could have held on, because I know you get a pretty hard jolt when going slow, and this car was going rapidly. I believe if I had held on to it, it might have swung me a little, but I do not think it would have thrown me at all if I had hold of the bar."

Two things are patent upon appellee's own statement: First, that he boarded the car voluntarily when it was so crowded that he was compelled to stand on the platform; second, that even there he was perfectly safe until he released his grasp on the "handhold." This he did voluntarily. The conductor did not force, or even ask him, to do so, or know that this was necessary in order for him to pay his fare. Appellee knew the car was running rapidly, and that there were curves in the track, for he, in another part of his testimony, states that he had traveled the line twice daily for three or four years. It is true, he did not have it in mind that he was so near the curve, but when he released his grasp, the retention of which made his otherwise perilous position on the platform secure, this was a voluntary act for which the company was in nowise responsible. The request of the conductor, that he pay his fare, was not of that urgency which required him to imperil

Digitized by Google

life or limb in an effort to comply with it. He could have explained to the conductor his position, or he could have crowded in further, or requested the conductor to stop the car and let him get off, rather than place himself in the peril which was involved in his releasing his grasp of the "handhold" while the car was being rapidly propelled along the track. It was not the striking of the curve at too rapid a rate that threw him to the ground, but, according to his own statement, this was the result of his releasing his grasp on the "handhold" of the car.

There is nothing in this record that tends to show that any act or omission on the part of the company was the proximate cause of appellee's injury; but, on the contrary, his own statement shows beyond question that he was injured by his own reckless negligence in releasing his grasp of the "handhold" while standing on the edge of the platform of the car. It takes but little familiarity with street cars and natural laws to know that if a passenger stands on the edge of the platform, without holding on to something to prevent him from falling, when the car strikes a curve—whether it be going fast or slow—he is in great danger of being thrown off. Appellee knew this, and, so knowing, he had no right—at the expense of the company—to imperil his life or limb in the manner which his own statement shows he did. His negligence in this matter is too plain for dispute.

The trial court should have sustained appellant's motion for a peremptory instruction to the jury to find for it at the close of appellee's testimony; and for this reason the judgment is reversed for proceedings consistent herewith.

Petition for rehearing by appellee overruled.

Digitized by Google

CASE 23.—PROSECUTION BY THE COMMONWEALTH AGAINST THE ADAMS EXPRESS COMPANY FOR A VIOLATION OF THE PROHIBITION LAW.—April 27, 1906.

Adams Express Company v. Commonwealth No. 1835

Appeal from Knox Circuit Court.

H. C. FAULKNER, Circuit Judge.

Defendant convicted and appeals. Affirm.ed.

1. Commerce—Interstate Traffic—Sale of Intoxicating Liquors.—Where a liquor dealer outside the State ships whisky C. O. D. into the State consigned to one who has not ordered it, and then notifies him thereof, whereupon he pays for and receives it, the transaction is not interstate commerce.
2. Intoxicating Liquors—Violation of Prohibition Law—Express Companies.—Where a liquor dealer outside the State ships whiskey by an express company, C. O. D. consigned to one who has not ordered it, and then notifies him thereof, whereupon he pays the company therefor, and receives it, the company is guilty of violating the prohibition law, even if it believes the acts of the consignor are legitimate acts of interstate commerce.
3. Same—Evidence.—Evidence on a prosecution of an express company for violation of the prohibition law held sufficient to show that it knew the nature of the transaction.

LAWRENCE MAXWELL, JR., JOSEPH S. GRAYDON, W. L. BROWN and C. W. METCALF for appellant.

STATEMENT OF POINTS AND AUTHORITIES.

1. The appellant did not know that the liquor had not been ordered. The shipments were therefore legitimate transactions of interstate commerce so far as it was concerned. (Ellington v. State, 86 S. W. Rep., 330—Tex. Crim.)

Digitized by Google

2. Being interstate shipments they were not subject to the law of Kentucky, and, as applied to them, section 2557b, subsection 4, Kentucky Statutes, is void. (American Express Company v. Iowa, 196 U. S., 133, 144; Adams Express Company v. Iowa, 196 U. S., 146; Rhodes v Iowa, 170 U. S., 412, 420.)

3. Appellant had no right to ask the shipper if the liquor had been ordered. (Crouch v. L. & N. W. Ry. Co., 14 C. B., 255, 291; the Nitro-glycerine case, 15 Wall., 524, 535; Hutchinson on Carriers, section 439.)

ADDITIONAL POINTS AND AUTHORITIES FOR APPELLANT.

1. The statute is clearly unconstitutional because it forbids all C. O. D. shipments of liquor, whether ordered by the consignee or not. The courts cannot make a new law or confine the operation of this law to cases within the constitutional power of the legislature, but must determine whether the statute as passed is valid. (United States v. Reese, 92 U. S., 214, 221; Trade Mark Cases, 100 U. S., 82, 98; James v. Bowman, 190 U. S., 127, 142; Wynehamer v. People, 13 N. Y., 378.)

2. Transportation for others as an independent business is commerce. (Hanley v. Kansas City Southern Railway, 187 U. S., 617, 619; Lottery Case, 188 U. S., 321, 352.)

3. Whisky is an article of commerce. (Leisy v. Hardin, 135 U. S., 100, 110.)

4. As applied to the business of an interstate carrier the statute is a regulation thereof repugnant to the Constitution of the United States. (American Express Company v. Iowa, 196 U. S., 133; Adams Express Company v. Iowa, 196 U. S., 147; Rhodes v. Iowa, 170 U. S., 412; Bowman v. Chicago & Northwestern Railway Company, 125 U. S., 465; Central of Georgia Railway Company v. Murphey, 196 U. S., 194; Wabash, St. L. & P. Ry. Co. v. Illinois, 118 U. S., 557.)

5. The principles of the common law are operative upon all interstate commerce transactions except so far as they are modified by congressional enactment. (Western Union Telegraph Company v. Call Publishing Company, 181 U. S., 92, 102; Hall v. DeCuir, 95 U. S., 485, 490; Brennan v. Titusville, 153 U. S., 289, 302; Central of Georgia Railway Co. v. Murphey, 196 U. S., 194.)

6. If the statute is limited to cases in which the carrier knows that the liquor has not been ordered by the consignee, the conviction must nevertheless be reversed because there was no averment of that fact and no proof of guilty knowledge on the part of the defendant. (Ellington v. State, 86 S. W., 330; Vowells v. Commonwealth, 83 Ky., 193, 195; Abbott v. Commonwealth, 20

Digitized by Google

Ky. Law Rep., 727; 47 S. W., 576; Tantum v. Commonwealth, 22 Ky. Law Rep., 927; 59 S. W., 32; Brown v. Commonwealth, 24 Ky. Law Rep., 727; 69 S. W., 1098.)

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

POINTS AND AUTHORITIES.

1. Presumptions of Law.—Every one is presumed to know the law; ignorance of the law excuses no one. The appellant is presumed to know that on the arrival of these packages at their final destination, they ceased, under the operation of the Wilson Act, to be protected as articles of interstate commerce; and that they were thereafter under the jurisdiction of the laws of this State and subject to its police regulation, and it matters not whether the same were ordered or not ordered. As soon as said packages arrived they became subject to the operation of the local option laws, and the delivery thereafter, and the acceptance of the C. O. D. charges by said company was a violation of said laws. (Taylor on Evidence, 6th edition, page 84; Best on Evidence, 1st Am. edition, section 306; Wharton on Evidence, 3d edition, sections 1226, &c.)

2. State Laws become Operative on the Arrival of said Packages.—A common carrier engaged in carrying such packages, as those in question in this case, from one State into another, cannot, after said packages have arrived at their final destination, stay or prevent such packages becoming a part of the property of the State and subject to the jurisdiction of its law. After such arrival the relation of the carrier to such packages is that of a warehouseman. (Schouler's Bailments and Carriers, 3d edition, sections 390, 500, 510 and 516; Wald & Co. v. L., E. & St. L. R. R. Co., 92 Ky., 645; Weed v. Barney, 45 N. Y., 344 (6 Am. Rep., 96); Gilson v. American Mer. Union Express Co., 1 Hun., 389; Marshall v. American Express Co., 7 Wis. (73 Am. Dec., 381); Pacific Express Co. v. Wallace, 60 Ark., 381.

3. Burden of Proof.—When the Commonwealth had shown the delivery of the packages and the acceptance of the C. O. D. charges thereon, and that the local option law was then in force and effect in said county and city, it had made a prima facie case; and the burden of proof was then on the appellant to show that the delivery of said packages and the acceptance of the C. O. D. charges by the carrier, were a part of an interstate shipment of merchandise, and therefore exempt from the jurisdiction and operation of the police regulations of the Commonwealth. (State v. Robinson, 49 Me., 287; Commonwealth v. Zelt, 138 Pa. St., 628; State v. Miller, 53 Iowa, 87; Rice on Evidence,

Digitized by Google

section 260, page 425; Orme v. Commonwealth, 21 Ky. Law Rep., 1412.)

4. Judgments.—These causes having been submitted to the trial court without the intervention of a jury, the judgments, herein are, under the practice of this State, the verdicts of properly instructed juries. (Ellison v. Commonwealth, 6 Ky. Law Rep., 306; City of Mt Sterling v. Holly, 22 Ky. Law Rep., 358; Civil Code, section 332.)

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The appellant was indicted by the grand jury of Knox county, Ky., for a violation of the prohibition law prevailing therein. The indictment contains much surplusage with reference to what is called the "C. O. D. Statute," and as to the manner in which the Adams Express Company received the whisky said to have been sold by it in contravention of law. Stripped of all unnecessary verbiage, the indictment contains a statement sufficient to charge the defendant company with a sale of liquor by retail, in violation of the prohibition statute applicable to Knox county; and as to the unnecessary allegations, they may be dismissed from view under the shelter of the maxim "utile, per inutile non vitiatur." The defendant company pleaded not guilty, and the case was submitted to the court on the law and facts—the intervention of a jury being waived—resulting in an adverse judgment against it.

The evidence showed, for the commonwealth, the delivery by the defendant's agent, J. A. Owens, to one J. D. Main, of a gallon of whisky, for which he paid $3.85, which the agent at once transmitted to the shipper of the whisky in Cincinnati; also that Main did not order the whisky, and did not know the name of the consignor, but it was shipped to him at Barbourville, Knox county, Ky., from Cincinnati, by

Digitized by Google

the Adams Express Company, C. O. D. This is but a small part of a general system prevailing by which unscrupulous dealers in whisky undertake through the facile aid of express companies, to evade the prohibition laws in effect in certain counties in the State, and retail liquor therein in violation of the laws forbidding such traffic. By this system the names of the men accustomed to drink whisky are obtained by the dealers, and then, without any order therefor, or any contract whatever, the whisky in gallon packages is sent to various small towns throughout the prohibition counties addressed to the parties whose names are thus acquired. The express company does not notify the involuntary consignee, but simply holds the whisky in its warerooms, and the party in whose name the liquor had been expressed receives notice, either by postal from the consignor, or by some local agent of his in the county, that there is an express package for him and then, whenever the thirst for liquor becomes sufficiently strong to tempt him to pay the express charges and take it out of the express office, this is done. The name of the consignor is not known by the involuntary consignee, and the address for the return of the money is the number of a lock box in the Cincinnati post-office. After the involuntary consignee becomes sufficiently acquainted with the system existing between the consignor and the express company, he finds that a gallon of liquor is generally kept at the express office subject to his order and the payment of charges, and he goes there for it with the same confidence that he would go to an ordinary dealer. The evidence in this case shows that, within six months next before the trial, J. D. Main had taken from the Adams Express Company's office at Barbourville, Ky., as many as 20 separate packages of

Digitized by Google

whisky, of a gallon each, and the testimony of the express agent shows that he often had as many as 50 gallons of whisky on hand at one time consigned to various parties under the same system. Frequently, several parties club in and take out whisky together, dividing it in proportion to the amounts paid in by each; it being a rigid rule of the defendant company never to deliver the whisky to any person other than the named consignee. It was stipulated between the commonwealth and the defendant that the whisky in question was shipped from Cincinnati in the ordinary course of the express business.

The first and crucial question in this case is whether or not the shipment and delivery of the whisky was an act of interstate commerce. If so, it may be conceded that the defendant should go acquit; if not, it is practically conceded that the acts of the defendant constituted a sale of liquor in Knox county in violation of the prohibition law. We do not think the amendment of the prohibition law commonly denominated the "Farris," or "C. O. D." law has any bearing upon the merits of the offense under discussion. The learned counsel for appellant hinge the whole defense on the fact that the act of the express company constituted the carrying on of inter-state commerce, and the C. O. D. law, being an attempt to regulate inter-state commerce, which admittedly is under the exclusive regulation of the Congress of the United States, is for that reason void. This may be conceded. However, if the C. O. D. amendment was stricken from the statute book entirely, it would not affect in any way the merits of the transaction under investigation as we see it. The prohibition statute, without the amendment, forbids, under penalty, the sale of liquor by retail in Knox county; but neither the statute itself, nor the amendment thereto, under-

Digitized by Google

takes to regulate inter-state commerce. No State statute can affect inter-state commerce, and the Legislature did not attempt to do so by that in question.

We do not agree to the proposition that the transaction which took place between the express company and J. D. Main in Knox county was interstate commerce. Nor do we agree with the Attorney General in his view of the effect of the Wilson bill upon the transaction in hand. As we understand him, he insists that, although the shipment from Cincinnati be conceded to have been a legitimate act of interstate commerce in its original inception, yet after the goods arrived in Barbourville, if kept overtime in a wareroom, then the transaction ceases to be one of interstate commerce, and becomes one of local commerce. We do not understand the Wilson bill, as construed by the Supreme Court of the United States, to have this effect upon a shipment of the kind under discussion. Without naming the decisions, or discussing them with minute particularity, we understand the Supreme Court to have decided, in the various cases cited in the briefs of counsel, that, where the whisky is purchased in a foreign State, it may be shipped by the seller to the buyer into a State where the sale of liquor is prohibited by law; that it is interstate commerce, unaffected by the local law, until it is delivered to the consignee, and the mere lapse of time, or the particular place where the goods are kept until called for, have no effect to change the quality of the transaction so that it ceases to be interstate commerce before the delivery. If this were not true, then if the consignee happened to be absent from home, or refuse to call for his goods promptly, that which was a legitimate transaction in its original inception would become vicious and illegal by the mere lapse of time occasioned by the negligence of the

Digitized by Google

consignee. If the transaction be interstate commerce originally, it continues so until the goods are delivered into the hands of the consignee.

But was this transaction interstate commerce? No contract of purchase is even pretended to have been made in Cincinnati. So far as the consignor is concerned, he simply shipped his illegitimate goods into the State of Kentucky to a point where the prohibition law prevails, and through the instrumentality of the express company there made a sale to J. D. Main. No one disputes, or can dispute, that the transaction, so far as the consignor was concerned, was illegitimate and in violation of the law. He shipped forbidden goods into a prohibition district of Kentucky for the chance of being able to sell it after it reached its destination to Main. So far as he is concerned, the transaction in substance is the same as if he had brought the whisky himself to Barbourville and there sold it to Main. This being true, the transaction was not interstate commerce. The commonwealth proved facts which, of themselves, established the guilt of the defendant company. It showed the existence of the prohibition law in Knox county, the delivery of liquor by the defendant to Main, and the payment of the price by the latter to the company's agent. These facts constituted an offense under the prohibition laws prevailing at the place of sale, and the defendant is guilty unless it has a defense which takes the transaction from without the operation of the State statute. It seeks to do this by alleging that the transaction was interstate commerce. The burden to establish this fact is upon the defendant. There can be no doubt of the soundness of this proposition. When the commonwealth has established facts which show the guilt of the accused, if the defendant seeks to avoid the legal effect of this evidence, it must do

Digitized by Google

it to the satisfaction of the court or jury, or else be condemned. Did the defendant show that the transaction out of which grew the offense with which it stood charged was interstate commerce? The answer to this must be in the negative. It simply showed that it received in Cincinnati, in the usual course of business, which means no more, as we understand it, than that the goods were shipped in the ordinary way, whisky consigned to J. D. Main in Barbourville, Ky.; but this does not constitute interstate commerce. Unless there was a bona fide shipment to a real consignee in Barbourville, the transaction was not interstate commerce, but a mere simulacrum of interstate commerce. In this case there was no bona fide shipment of merchandise from Cincinnati to Barbourville, but there was an illegal sending of whisky into Knox county through the instrumentality of the express company for the purpose of finding a buyer there. In its very substance, the unknown consignor, whose headquarters is a lock box in the Cincinnati post-office, simply appointed the Adams Express Company as his agent to find for him a purchaser in Knox county for a gallon of whisky on a given commission. The defendant cannot say it did not know the transaction was an illegitimate one, or that it believed it was a bona fide shipment. It must show in defense of its otherwise illegal act in Knox county, that the State law did not apply to it at that time, because what it did was an act of interstate commerce. Now, interstate commerce cannot be based upon fraud or chicanery. It must necessarily be a legitimate transaction. The Constitution and statutes of the United States are not shields for criminals; nor do they furnish a means by which crime may be effectuated. The Supreme Court of the United States does not uphold criminal acts, or pro-

Digitized by Google

tect criminals from the consequence of their misdoings. The transaction which took place between Cincinnati and Barbourville bears the same resemblance to interstate commerce as the wares of the green goods man bears to the genuine money of the United States. Both are mere counterfeits. As said before, in order to escape conviction, the burden was upon the defendant to show that its acts were in pursuance of a contract of interstate commerce.

In the case of State v. Robinson, 49 Me., 285, four baskets of champagne were seized under the laws of the State, and the question arose whether or not they, being in the original packages, were subject to seizure, and the question of interstate commerce was involved. It was said: "It is not pretended, in the case at bar, that the wine was imported by Robinson. If he claimed the right to sell it on that ground, the burden of proof was on him to show that he was the importer. No evidence on that point was offered. The instructions given to the jury, that he had shown no right to sell, were correct, and the exceptions must be overruled." The case of Commonwealth v. Zelt. 138 Pa. 615, 21 Atl. 7, 11 L. R. A. 602, in principle involved the same question as the Maine case above cited. The court, on the question in hand, said: "The fourth assignment is not sustained. The fact that defendant Porter was the agent of an importer was a matter of defense, and the burden was upon him to establish it by competent evidence, to such an extent as to throw a reasonable doubt upon the commonwealth's case. This is substantially what the court below said to the jury."

Suppose, instead of the defense being interstate commerce, it had been license, and the appellant had undertaken to defend the sale in question by showing that it was the agent of the seller, and that the latter

Digitized by Google

was duly licensed to carry on the business; would it be sufficient to show that it believed its principal was licensed, and would the court hear such evidence? On the contrary, in order to defend, would it not be imperative upon it to show, not that it honestly believed it was, but that it was, the agent of a licensed dealer? In the case at bar, the defendant undertakes to show that it was the agent of the consignor, and that it believed the consignor's acts were legitimate acts of interstate commerce. Is this a better excuse than the one supposed? We think not. Appellant cannot shelter itself under its common-law duty as a common carrier of goods. There is no common-law duty devolving upon a common carrier to act as the collecting agent of the consignor. That is a matter of private contract, and one which the carrier may enter into, or refuse, at its option. When it does make such a contract, it stands with reference to it just as any other agent. In Am. & Eng. Encyc. of Law, volume 12, page 553, on this subject, it is said: "There is no common-law duty devolving upon an express company to act as the collecting agent of the shipper. Such obligation arises only by contract, express or implied." Cox, Hill & Thompson v. Columbus & Western Railway Co., 91 Ala. 392, 8 South. 824; James McNichol v. Pacific Express Co., 12 Mo. App. 401.

But, passing this, while there is no direct evidence upon which one could lay his finger and say this showed knowledge, or that showed knowledge, on the part of the express company, that the business in which it was engaged was a criminal one, we think, taking the evidence as a whole, and looking at the circumstances from the point of view in Barbourville, there was enough to show that the defendant was bound to know that the consignors were carrying on,

Digitized by Google

systematically, a criminal business, and that the names given as consignees to the various packages of whisky shipped were fictitious. In other words, while there were real persons in Barbourville bearing the names used, these persons had no contract of purchase, but the whisky was shipped in their names with a view of tempting them to purchase it after its arrival in Barbourville. Let it be remembered that Barbourville is a small town, scarcely above the dignity of a village, although it is the county seat of Knox county. It is a matter of common knowledge that in a small town there are no secrets. Every man knows every other man, what he does, how he conducts himself, and what are his habits. The system under consideration had been carried on a long time. Owens, the express agent, states that he had been at Barbourville 14 years; that during that time shipments of whisky had been received in the same way continuously. He admits that in no case did he ever notify any named consignee that there was a package for him. This tends to show that he expected the party to be notified in other ways. Large numbers of similar packages were held by him constantly. He rigorously enforced the rule not to deliver a package to any one except the consignee. This showed him to be a formalist, and that he know the advantage of surrounding the transaction with every semblance of legality. To borrow one of Edmund Burke's fine phrases, the transaction was made "most iniquitously legal." We do not believe it possible for an illegitimate business to be carried on through the express company on so large a scale, for so long a time, and especially where remittances were to be made to a lock box, instead of to a named firm, without its being ascertained that the system was criminal. Viewing the whole case, together with the large

Digitized by Google

number of similar cases against the same defendant involving the same facts, and which were all heard together, we are forced to the conclusion that the agents of the defendant corporation at Barbourville knew of the illegality of the system they were helping to conduct, and that the corporation itself was the accomplice for pay of the criminal consignors.

The question involved here is a most important one for the people among whom the offense was committed. The mountain counties of Kentucky are thinly populated, and the arm of the law is necessarily weak, and the passions of men correspondingly strong. We do not transcend the bounds of judicial conservatism in saying that a very large number of the cases involving violent crimes which come to this court, on appeal from that section of the State, are directly caused by the use of whisky. Largely influenced by this consideration, no doubt, the good people of a majority of the mountain counties have sought to control crime by the enactment of prohibition laws, and the welfare of the whole community is bound up in the enforcement of these laws. It goes without saying, however, that if, by the instrumentality of such transactions as we have under discussion, whisky can be introduced and sold by retail through the aid of the express company, which makes itself the agent to deliver the spirits and collect the pay therefor, the law is reduced to a nullity. We do not believe that an express company can legitimately thus thrust the shadow of its greed between the people and their uplift.

The judgment is affirmed.

Digitized by Google

CASE 24.—ACTION BY E. H. TAYLOR, JR. & SONS COMPANY AGAINST MARION E. TAYLOR FOR INFRINGEMENT OF PLAINTIFF'S TRADE-MARK.—March 17, 1905.

E. H. Taylor, Jr. & Sons Co. v. Taylor

Appeal from Jefferson Circuit Court, Chancery Division.

Judgment for defendant. Plaintiff appeals. Reversed.

Trade-Mark—Assignment—Infringement—Fraudulent Use—Remedy—Complaint—Election Between Counts—

1. In an action for infringement of a trade-mark in the sale of whisky, it was proper to require plaintiff to elect between his cause for injunction and accounting, and his cause for damages based on fraud.
2. Where plaintiff corporation purchased a distillery from the assignee of an insolvent partnership, and continued to use the brand and trade-mark of such firm without objections by the assignee or creditors of the firm, it must be presumed, in an action against a third person for the infringement of the trade-mark, that the debts of the partners were settled, and that the trade-mark reverted to the partners as their property, and that they had the right to use it in the name of the corporation which they subsequently formed.
3. The application for registry of plaintiff's trade-mark stated that it "consists of the arbitrary word symbol 'E. H. Taylor, Jr., & Sons,' being a script fac simile of the signature of our name by the senior member thereof. This has generally been arranged x x x in black script, on a horizontal line within a circular border embracing the words 'Old Taylor,' but these are nonessential," etc. Held, that a trade-mark used by the defendant, having in it the words "Old Kentucky Taylor," is not an infringement of the plaintiff's trade-mark.
4. In connection with his trade-mark in the sale of straight whisky plaintiff used the words "Old Taylor," though the essential feature of the registered trade-mark was the script

Digitized by Google

fac simile signature "E. H. Taylor, Jr., & Sons." Defendant, in advertising his blended whisky, used the words "Kentucky Taylor" and "Old Kentucky Taylor." Held that, though there is not such an infringement of a trade-mark as entitles plaintiff to an injunction and an accounting, defendant is guilty of a fraudulent simulation of plaintiff's whisky, and plaintiff is entitled to an action for damages for the fraud.

WM. McKEE DUNCAN, WM. LINDSAY and HAZELRIGG & HAZELRIGG for appellant.

HUMPHREY, HINES & HUMPHREY for appellee.

(No brief in record.)

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

E. H. Taylor, Jr., & Sons Company is a corporation formed under the laws of Kentucky, and engaged in the manufacture and sale of whisky in Woodford and Franklin counties, claiming the exclusive use of a certain trade-mark, which is lettered upon the barrels, bottles and cases containing their whisky, and printed upon their letter heads and their advertisements; their brand being "Old Taylor," coupled with the words, "The Premier Kentucky Whisky," and with the script signature of E. H. Taylor, Jr., & Sons. It filed this suit, charging in its petition that, while it had the exclusive right to use the above trade-mark the defendant, Marion E. Taylor, was, without its consent, in the city of Louisville, using on barrels, bottles, etc., containing a spurious compound of whisky, a trade-mark and brand substantially the same as, and almost identical with, that of the plaintiff; that this he did fraudulently to mislead the public, purchasers and consumers of whisky, into the belief that the whisky so branded by him was the whisky manufactured by the plaintiff; that the

Digitized by Google

defendant advertised himself as a distiller, when he owned no distillery, and was not a distiller of whisky, and was palming off his compound as "Old Taylor" whisky, although he was only a blender of whisky, and was thus infringing upon the plaintiff's trade-mark, which was of value $100,000, and had thus enriched himself to the full amount of $75,000. An injunction was prayed, restraining the defendant from further piracy of its trade-mark, and an account was sought of profits made by the defendant in his infringement of the plaintiff's trade-mark, and also damages in the sum of $100,000 for the simulation of plaintiff's whisky, and the selling of defendant's whisky for it. The defendant entered a motion that the court required the plaintiff to elect whether it would prosecute the claim on account of profits or the claim for damages. The court sustained the motion, and thereupon the plaintiff elected to sue for an injunction and accounting of profits, and dismissed so much of its petition, without prejudice, as claimed damages; reserving the right to sue therefor in another action if it should so desire. This action of the court was proper, as the plaintiff was not entitled to both an accounting of profits, and damages for the simulation of its whisky. The account of profits could be had in an equitable action, but damages for the simulation of its whisky would properly be had in a common-law action, as in other cases of fraud. There was thus left in the action only the question of an injunction and an accounting of profits if the infringement of the trade-mark was established. The defendant answered, traversing all of the allegations of the petition. On final hearing the court dismissed the petition, and the plaintiff appeals.

The proof shows that on January 1, 1887, a partnership was formed of E. H. Taylor, Jr., & Sons.

Digitized by Google

This firm operated a distillery in Woodford county, manufacturing whisky which was known as "Old Taylor," and was so branded on the barrels, bottles, etc. They advertised it very extensively, and it attained a high reputation as a first-class whisky. The firm made an assignment in the year 1893, and on April 30, 1894, the corporation of E. H. Taylor, Jr., & Sons Company was formed, which has since manufactured "Old Taylor" whisky, and has continued to advertise it extensively and sell it all over the country. It is claimed by the defendant that it is not shown how the corporation ever got the right to use the brand "Old Taylor," no transfer appearing from the assignee of the firm. But it is shown that the corporation bought the distillery at which the whisky was made, and as neither the assignee nor any of the creditors of the firm have objected to the use of the brand by the corporation, it must be presumed that the debts of the firm were settled, and that the brand, as the property of the partners, reverted to them, and that they had the right to use it in the name of the corporation which they subsequently formed.

It remains, therefore, to determine what trade-mark the firm had. It appears that the firm applied in 1887 to the United States authorities to register a trade-mark, "Taylor," or "Old Taylor," but the application was rejected by the Patent Office because of a prior use of the brand. After this, in the year 1889, the firm made another application to the Patent Office to register a trade-mark, which was granted. In this application they said: "Our trade-mark consists of the arbitrary word symbol 'E. H. Taylor, Jr., & Sons,' being a script fac simile of the signature of our firm name by the senior member thereof. This has generally been arranged, as shown, in the accom-

Digitized by Google

panying fac simile, in which it appears, in black script, on a horizontal line within a circular border embracing the words 'Old Taylor,' but these are non-essential, and it may be differently arranged or colored without materially altering the character of our trade-mark. It has sometimes been used with additions in the following form, to-wit: 'Yours truly, Edmund H. Taylor, Jr., & Sons;' but the essential feature of the trade-mark is the script fac simile signature 'E. H. Taylor, Jr., & Sons.' This trade-mark has been used continually in business by us since January 1, 1887."

Where a trade-mark is registered, the registry must be presumed to show what the trade-mark is, and things which are disclaimed as going to make up the trade-mark must be considered as abandoned. Under this rule, the trade-mark of the firm did not consist in the words "Old Taylor," for these are expressly said to be non-essential in the application, and the essential feature in the trade-mark is the script fac simile signature, "E. H. Taylor, Jr., & Sons," by the senior member of the firm. Stagg v. Taylor, 95 Ky. 661, 16 Ky. Law Rep. 213, 27 S. W. 247. It is not claimed that the defendant has infringed in any way this trade-mark. He has not used anything in his brands of this character, and therefore so much of the action as sought an injunction to restrain the defendant from infringing the plaintiff's trade-mark, or an account of profits therefor, was properly dismissed by the circuit court.

It remains to consider whether there was a fraudulent simulation of the plaintiff's whisky by the defendant. The proof shows that the plaintiff's whisky was a high-priced article, and was advertised extensively as a pure distilled whisky, most of it

Digitized by Google

being bottled in bond. The defendant, Marion E. Taylor, at the time the suit was brought, was not a distiller, and did not own a distillery. He was a rectifier doing business in Louisville. Before going in business in Louisville, about the year 1889, he had been a drummer traveling through the South, and had been known among some of his friends as "Kentucky Taylor." When he went into the rectifying business he began putting up a whisky which he called "Old Kentucky Taylor." Rectified or blended whisky is known to the trade as "single-stamp whisky," while bonded whisky is known as "double-stamp goods." The proof shows that the rectifiers or blenders take a barrel of whisky, and draw off a large part of it, filling it up with water, and then adding spirits or other chemicals to make it proof, and give it age, bead, etc. The proof also shows that from 50 to 75 per cent of the whisky sold in the United States now is blended whisky, and that a large part of the trade prefer it to the straight goods. It is a cheaper article, and there is therefore a temptation to simulate the more expensive whisky. The bottles in which the defendant sold his whisky were not similar to the plaintiff's bottles. The label used by the appellant on its bottles is as follows:

Digitized by Google

Appellee used on his bottles the following labels:

Digitized by Google

In his advertisement appellee followed often the label on his bottles. In other advertisements he used the following:

Appellee advertised his whisky extensively, and we think it reasonably clear that one reading these advertisements, who was not familiar with the whisky trade, would understand that "Old Kentucky Taylor" was a straight whisky; and, without going into the minutiæ of the evidence, we deem it sufficient to say that we are satisfied from it that appellee intentionally labeled and advertised his whisky as he did, to pass it off, not as blended goods, but as the whisky of appellant, which had attained a very high reputation as a pure Kentucky distilled whisky, and that his thus selling his blended whisky was a violation of appellant's rights. Appellant had sent out

Digitized by Google

thousands of circulars every month advertising its whisky. It has spent hundreds of dollars in the trade journals and otherwise advertising it as the "Premier Kentucky Whisky," and it had thus given value to its brand. Appellee's whisky was a cheaper article, and could be sold at prices at which appellant could not afford to sell its whisky. The selling of the cheaper goods under labels and advertisements which to the uninitiated would indicate that it was appellant's whisky, so well advertised as a first-class article, cannot be sanctioned. The defendant may properly sell his brand of "Old Kentucky Taylor," provided he so frames his advertisements as to show that it is a blended whisky, but he cannot be allowed to impose upon the public a cheaper article, and thus deprive appellant of the fruits of its energy and expenditures by selling his blended whisky under labels or advertisements which conceal the true character of the article, for this would destroy the value of the appellant's trade.

In the action for fraudulent simulation of the plaintiff's goods there can be no accounting of profits in equity. The remedy is by the common-law action for damages, as in any other case of fraud. So much of the action as sought damages having been dismissed by the appellant without prejudice, the only remedy to which it is entitled is an injunction as above indicated.

Judgment reversed and cause remanded for a judgment and further proceedings consistent herewith.

Digitized by Google

CASE 25.—PROSECUTION BY COMMONWEALTH AGAINST THE ADAMS EXPRESS COMPANY FOR A VIOLATION OF THE LOCAL OPTION LAW.—June 17, 1905.

124 182
126 283

Adams Express Company v. Commonwealth

Appeal from Laurel Circuit Court.

H. C. FAULKNER, Circuit Judge.

Defendant convicted and appeals. Affirmed.

Intoxicating Liquors—Local Option—C. O. D. Shipments—Liability of Carrier—Defense—Interstate Commerce.—An express company which knowingly carries a C. O. D. shipment of liquor from a foreign state into local option territory to a consignee who informs it that he has not ordered the same but will accept it if it is held for him until he can procure the money to defray the charges, becomes, by holding the liquor a week pursuant to the arrangement with the consignee, a mere bailee or warehouseman of the liquor, and cannot defend a prosecution under Ky. Stats., 1903, section 2557, sub-section 4, declaring sales of liquor shipped C. O. D. into local option territory unlawful, and making the carrier selling or delivering the goods liable jointly with the vender, on the ground that the shipment is interstate commerce, but is guilty of a violation of the statute, as the actual seller of the liquor.

W. L. BROWN and GEORGE BROCK for appellant.

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

(No briefs—record misplaced.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

The appellant, the Adams Express Company, a

Digitized by Google

common carrier, was indicted, tried, and convicted in the Laurel circuit court for the offense of unlawfully, willfully, and knowingly shipping, procuring for, furnishing, selling, and delivering spirituous liquor, by C. O. D. shipment, to one George Meece, at East Bernstadt, in Laurel county; the sale of such liquor being prohibited by certain statutes enacted by the Legislature of Kentucky, approved April 4, 1884, March 10, 1894, and March 11, 1902. These acts were then in force in the five counties of Laurel, Rockcastle, Jackson, Owsley, and Clay. The trial jury fixed the punishment of appellant at a fine of $60, on which judgment was duly entered; and, the lower court having overruled its motion for a new trial, it prosecutes this appeal.

In Crigler v. Commonwealth, 120 Ky. 512, 87 S. W. 276, 27 Ky. Law Rep. 918, it was held by this court that what is known as the "Five Counties Act," of April 4, 1884 (1 Acts 1883-84, p. 1116, c. 598), forbidding the sale of liquors in the five counties named therein, is in force in Laurel county, as is the local option law of March 10, 1894 (Acts 1894, p. 123, c. 52), together with the amendment thereto of March 11, 1902 (Laws 1902, p. 41, c. 14; see section 2557, Ky. St. 1903), and that the two acts last mentioned must be construed as a part of the act of 1884; regulating and controlling the former as to procedure, the quantity of liquor sold to constitute an offense, and the punishment. That is, it was held that the local option act of 1894, as amended by that of 1902, is operative in Laurel county without the necessity of a vote by the people, and that of the existence of the act of 1884, and the operation of that of 1894 as amended in 1902, this court will take judicial notice.

The fine inflicted against appellant was imposed under the act of 1894, as amended in 1902 (section

Digitized by Google

2557, Ky. St. 1903). Sub-section 4, section 2557, Ky. St. 1903, which is also a part of the general local option law as amended in 1902, provides: "All the shipments of spirituous, vinous or malt liquors to be paid for on delivery, commonly called C. O. D. shipments, into any county, city, town, district or precinct where said act is in force shall be unlawful and shall be deemed sales of such liquors at the place where the money is paid, or the goods delivered; the carrier and his agents selling or delivering such goods shall be liable jointly with the vendor thereof." The offense of which appellant was convicted is the one denounced by the foregoing section, and it is insisted for it that the alleged sale of spirituous liquor for which it was indicted and convicted under the statute was a mere delivery of the liquor by it as a common carrier, in the usual course of business, and the money paid by its agent by the consignee was in satisfaction of the amount due the consignor therefor upon a sale thereof made in the State of Ohio, which appellant, as a common carrier, was, under the contract of shipment, compelled to collect and remit consignor upon delivery of the goods, and, further, that the transaction was authorized, and appellant protected, by the law and regulations of interstate commerce.

The case went to the jury upon the evidence of the commonwealth alone, none having been introduced by the appellant. The undisputed facts established by the evidence were: First, That George Meece, within a year before the finding of the indictment, called at appellant's office in East Bernstadt with his brother, who had ordered and was expecting from Cincinnati a package of whisky, which he found awaiting him in appellant's office. Second, While in the express office, George Meece was informed by

Digitized by Google

appellant's agent in charge that a package containing a gallon of whisky was then in the office for him, the charge upon which was $3.85. He then informed appellant's agent that he had not ordered the whisky, was not expecting it, and had not the money with which to pay the charges thereon, but, if satisfactory to the agent, and the latter would hold the whisky for him until the following Saturday—a week later—he would call at the express office, pay for the whisky, and take it away. To all of which the agent readily assented, and on the following Saturday Meece called at the express office, paid the agent $3.85 for the gallon of whisky, received and took it away. Third. The agent knew that the package contained a gallon of whisky (i. e., four quart bottles), and that it was shipped by Crigler & Crigler, of Cincinnati, but did not advise Meece of the name of the consignors, though informed by Meece that he had not ordered the whisky. Fourth. The agent also knew the business of Crigler & Crigler, and that they were in the habit of shipping almost daily by express, C. O. D., to appellant's East Bernstadt office, packages of both whisky and brandy, consigned to persons of that community.

In view of the foregoing facts, it becomes necessary to determine whether, in holding the whisky a week at Meece's request, and until the latter again called at the office, paid the necessary charges, and took it, the appellant continued in the relation of carrier to the goods, or did it by the transaction in question cease to be a common carrier, and become a mere bailee or warehouseman? On this point, Hutchinson on Carriers (2d Ed.), section 354, states the general rule as follows: "The law upon this subject may therefore be stated to be that, so long as the carrier continues in the relation of carrier to the goods, he is

Digitized by Google

under an absolute engagement that they shall be delivered only to the person to whom they are consigned, but that when, from any cause, he ceases to hold them as carrier, and becomes a mere warehouseman or bailee, the degree of responsibility resting on him becomes changed, and from that moment, if the goods are lost by misdelivery or otherwise, it becomes a question of fact whether he has exercised reasonable care and diligence." In section 356 of the same book it is said: "It therefore frequently becomes a question of importance as well as of difficulty to determine when and under what circumstances the relation of carrier to the goods has ceased, and their custody has become a bailment. It may be stated as a general rule that when the carrier has done all the law requires him to do towards delivery, and from any cause he fails to effect it, and the goods are continued in his possession, he from that time becomes responsible only as depositary." In further elaboration of this doctrine, the author, in section 385, tells us: "But it has been held that if the carrier is instructed not to deliver the goods until they are paid for, and the consignee, instead of refusing to take them, promises to pay for them and take them in a few days, and requests the carrier to keep them until he is ready to pay for them, the carrier becomes a warehouseman of the goods, and if they are lost or destroyed while so held, without any fault or negligence of his, he will not be liable, although he has given no notice of the fact to the consignor." A similar view of the doctrine supra was announced by this Court in Wald & Co. v. Louisville, Evansville & St. Louis R. Co., 92 Ky. 645, 13 Ky. Law Rep. 853, 18 S. W. 850. So we may accept it as the law of this State. When a package marked "C. O. D." (collect on delivery) is received by an express company for

Digitized by Google

shipment, it is manifestly upon the conditions that such company, as a common carrier, shall promptly deliver it to the consignee, collect of the latter a specified sum therefor, and with equal promptness return it to the consignor. Express companies do not more surely deliver goods intrusted to them than do ordinary freight trains, but they undertake a quicker delivery, and, by reason of such undertaking, are permitted to charge and are paid more for the transportation of goods than are railroad companies. A failure, therefore, upon their part to immediately—that is, in a reasonable and customary time—deliver goods shipped in their charge, or their holding of such goods an unreasonable or unusual time, changes their relations at once from a common carrier to that of ordinary warehouseman. In view of this rule, and under the facts of the case at bar, we must conclude that at the time of delivering to Meece the whisky in question, and in receiving the price paid by the latter therefor, appellant did not sustain to that article of merchandise, or to the consignor or consignee, the relation of common carrier, but merely that of a bailee or warehouseman, for which reason we are unable to see how it was or could have been protected in the transaction by the law of interstate commerce.

We are aware that section 5258 of the Revised Statutes of the United States (U. S. Comp. St. 1901, p. 3564) confers upon railroad and express companies authority to carry freight from one State to another, free from interference on the part of the States, and that the Supreme Court of the United States, construing this statute, and defining the power of Congress with reference to its right "to regulate commerce with foreign nations, among the several States and with the Indian tribes," has repeatedly held "that State legislation which seeks to impose a direct bur-

Digitized by Google

den upon interstate commerce or to interfere directly with its freedom does encroach upon the exclusive power of Congress." It has also been held by the same Court that when intoxicating liquors are shipped from one State to another by express C. O. D., upon an order of instructions from the purchaser residing in such other State, the contract of sale is to be regarded as completed in the State from which the shipment is made, upon the vender's there delivering the goods to a common carrier, although with the direction to collect the price from the consignee before its delivery to him, and that the right of the importer to thus sell and ship liquors in unbroken packages in another State exists regardless of the local laws of such State prohibiting such sales and shipments, and notwithstanding the provisions of the act of Congress known as the "Wilson Bill" (Act Aug. 8, 1890, c. 728, 26 Stat. 313 [U. S. Comp. St., 1901, p. 3177]), which was intended to enable the several states, under the exercise of the police power, to enact such legislation as would give them the same control over intoxicating liquors shipped therein from other states after their arrival, whether in original packages or otherwise, as they might exercise over those of home manufacture or production. But in the case at bar the conviction of appellant was not in violation of any regulation of the laws of interstate commerce. It sold and delivered to Meece a gallon of whisky, and received of him $3.85 as the price of such sale, all with full knowledge of the fact that it had not been ordered by him. Furthermore, though appellant may have originally received the package of whisky as a common carrier, at the time of its sale it, as before stated, did not sustain to the package of whisky or to the consignor or consignee the relation of carrier, but that of bailee or warehouseman. In other words,

Digitized by Google

the sale was not made in another state, or by a shipper therein, but by appellant at East Bernstadt, in Laurel county, Ky., and in violation of the laws of the State, which, by subsection 4 of section 2557, Ky. Stats., 1903, makes such sale a misdemeanor. Whatever ground may be urged for holding that this statute is inoperative as to a shipment of spirituous liquors into this State from another state, made by the vender upon an order received in such other state from the purchaser in this State, it certainly cannot be void as to a sale wholly made and consummated in this State by a bailee after the whisky was received from another state.

Being of opinion that appellant's conviction was proper, the judgment is affirmed.

CASE 26.—ACTION BY GEORGE SCHUSTER & COMPANY AND OTHERS AGAINST THE CITY OF LOUISVILLE AND OTHERS TO RESTRAIN THE ENFORCEMENT OF AN ORDINANCE.—December 15, 1905.

Geo. Schuster &, Co., &c. v. City of Louisville &c.

124 189
138 444
138 803

Appeal from Jefferson Circuit Court; Chancery Branch (First Division).

SHACKELFORD MILLER, Judge.

Judgment for defendants. Plaintiffs appeal. Reversed.

1. Municipal Corporations—Taxation—Constitutional Provisions—Neither Const., section 181, relating to taxation, as amended, nor Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, requires any city or town to provide for taxation for municipal purposes on personal property, based on income, licenses, or franchises; but the municipal authori

Digitized by Google

ties are given the option to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, which option they may exercise, or not, in their discretion.

2 Same.—The option given to municipal corporations by Const., section 181, relating to taxation, as amended, and by Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, necessarily carries with it the power to define the classes of property as to which the substitution is made, since such substitution could not be made as to all classes of property.

3. Taxation—Equality and Uniformity—Constitutional Provisions. —Const., section 181, as amended, giving municipal corporations the option to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, does not repeal or impair the mandatory provision of section 171, declaring that all taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax.

4. Same.—While the municipal legislature may, under the amendment to Const., section 171, classify personal property on the basis of income, licenses, or franchises, the tax must be uniform within the territorial limits of the authority levying the tax; and, under the guise of substituting one method of assessment for another, the burden, which should fall on all equally, must not be shifted, so as to throw on some more of the common burden than their proper share.

5. Same.—Under Const., section 181, as amended, empowering the General Assembly to authorize cities to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses, or franchises, in lieu of an ad valorem tax thereon, and Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, giving cities such authority, an ordinance providing a sliding scale as to merchants and manufacturers, under which the tax decreases with the amount of sales or manufactured product, is repugnant to Const., section 171, requiring taxes to be equal and uniform.

6. Same.—A city council may by ordinance provide for the taxation of personal property, based on income, licenses, and franchises, provided the classes of property which are thus taxed are not favored and bear substantially the same part of the common burden as under the ad valorem system.

7. Same—National Banks.—Under the statute of the United

Digitized by Google

States no tax can be levied on national banks, based on income, licenses, or franchises.

8. Same—Discrimination between National Banks—Shares and Other Moneyed Capital.—Under Const., section 181, as amended, empowering the General Assembly to authorize cities to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses, or franchises, in lieu of an ad valorem tax thereon, and Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, giving cities such authority, an ordinance providing for the levying of a tax on state and national banks and trust companies, based on income, licenses, or franchises, is void as to national banks; and if the shares of such banks should be assessed on an ad valorem basis, while the state banks are taxed under the ordinance, the assessment would be void as to national banks as a discrimination in favor of state banks and trust companies, the rate on the ad valorem basis being higher than that paid by the state banks and trust companies under the ordinance.

9. Same—Income—License and Franchise Taxes.—An ordinance purporting to make a permanent rate for manufacturers, merchants, banks, and trust companies, based on income, licenses, and franchises, which shall be unaffected by the fact that the rate on other property, on an ad valorem basis, may go up or down as the years go by, is void.

10. Same—An ordinance fixing a tax, based on income, licenses, or franchises, is simply a substitute for ad valorem tax, and must in order to be valid, provide for an annual levy according to the ad valorem levy, and in such way as to produce practical equality between all classes of property, whenever a new ad valorem ordinance is passed.

11. Municipal Corporations—Taxation—Franchise Tax—Distribution of Proceeds.—A city council may properly apportion a franchise tax between the different objects for which taxes are levied in the same proportion as the ad valorem tax is divided, and may set apart to the school fund such a per cent thereof as 33 per cent. of the ad valorem tax bears to the whole of it.

ALFRED SELIGMAN for appellant.

POINTS MADE AND AUTHORITIES CITED.

1. The ordinance is unconstitutional.

It distinguishes between classes of personal property, i. e., personal property employed in business or manufacture or by a

Digitized by Google

trust company or bank and that not so employed.

It is against the provisions of the Constitution and the historic policy of Kentucky, and there is no warrant therefor in the amendment to Section 181 of the Constitution. (Constitution of Kentucky, section 181, as amended. Acts 1902, page 100; Act March 18, 1904, page 99, et. seq.; Constitution of Kentucky, section 171; Lexington, &c., v. McQuillan, 9 Dana, 518; Nicholasville v. Rarick, 102 Ky., 353; Latonia v. Hopkins, 104 Ky., 419; Broadway Baptist Church v. McAtee, 8 Bush, 508; Levy v. City of Louisville, 97 Ky., 403.)

2. It taxes unequally property employed in business or manufacture or by a bank or trust company, there being a variation in the rate according to the amount of business done, but the rate is not a uniform percentage of the sales. The tax, by the terms of the constitutional amendment, remains a tax on property and therefore within the provision of Section 171 of the Constitution requiring uniformity.

(a) The classification made by the ordinance is unreasonable, not being founded on natural facts, and is therefore void. (Constitution of Kentucky, section 181 as amended; Constitution of Kentucky, section 171; Levy v. City of Louisville, 97 Ky., 400; Sutton's Heirs v. Louisville, 5 Dana, 31; Lexington v. McQuillian's Heirs, 9 Dana, 513; Bureau v. Ch. R. R. Co., 44 Ill., 229; Parish E. Felecia v. Gurth, 26 La. An., 140; State v. Endom, 23 La. An., 663; Marsh v. Clark Co., 42 Wis., 503; Johnston v. Macon, 42 Ga., 645; Sims v. Parish Jackson, 22 La. Ann., 440; State v. Switzler, 143 Mo., 287; State, etc., v. Ferris, 53 Ohio St. Rep. I, 30 L. R. A., 219; Cummins v. Mer. Natl' Bank, 101 U. S., 153; State v. Gorman, 2 L. R. A., 701, 40 Minn., 232.-

(b) A discrimination to be sustained must be reasonable and founded on natural facts. (Tennessee v. Alston, 97 Tenn., 674, 28 L. R. A., 178; Kneisel v. Cottrel, 196 Pa. St., 614, 50 L. R. A., 87; State v. Farmers' Irrig. Co., 59 Neb., 4, 80 N. W., 53; McHenry v. Alford, 168 U. S., 663; Nashville v. Taylor, 86 Fed., 168; Wyatt v. Ashbrook, 154 Mo., 375, 48 L. R. A., 265; Minott v. Winthrop, 26 L. R. A., 259, 162 Mass., 113; Judson on Taxation, 564.)

(c) Even if a "license" and not a tax, there must be some regard for uniformity. (Cooley Taxation, 2d Ed., 260; Judson on Taxation, 599, 600; Council v. Renfro (Ky.), 58 S. W. Rep., 795; Century Dictionary for meaning of "equality" and "uniformity.")

Cases distinguished: (Magoun v. Ill. T. & S. Bk. Co., 170 U. S., 293; Clark v. Titusville, 184 U. S., 330; Judson on Taxation, 588; Commonwealth v. Clark, 195 Pa. St. Rep., 637.)

3. The ordinance fails to specify for what purpose or pur-

Digitized by Google

poses the tax is levied or imposed, and how the revenue therefrom shall be expended. This is in violation of the constitutional requirement. (Constitution of Ky., section 180; Act March 18, 1904; City of Somerset v. Somerset Bank Co., 22 Ky. Law Rep., 1132; Cahill v. Perine, 20 Ky. Law Rep., 1454; Pulaski v. Watson, 21 Ky. Law Rep., 61; City of Louisville v. Button, 26 Ky. Law Rep., 607; Kentucky Statutes, 2981; Spring Valley Coal Co. v. People, 157 Ill., 543.)

4. For a period the taxation is double. (Cooley on Taxation, 2nd Ed., page 394.)

5. Besides, the ordinance cannot be administered, as there is no way of applying to the tax collected thereunder the provisions and requirements of 2969, Kentucky Statutes, relating to the school tax.

HUMPHREY, HINES & HUMPHREY, A. E. RICHARDS, CHARLES A. WILSON and L. R. YEARMAN for Appellee.

SYNOPSIS.

1. The powers vested in the sinking fund are not violative of the personal liberty of the tax payer. (Cooley on Taxation, 3rd Ed., page 624; First National Bank v. Hughes, 106 U. S., 523; S. C. 27, L. Ed., 268; State v. Wood, 110 Ind., 82; 10 N. E. 639; Co-op. Bldg. and Loan Ass'n v. State, 156 Ind., 463; 60 N. E., 146; Smith v. City of Louisville, 9 Ky. Law Rep., 779; Ky. Stats., secs. 2984-A, Sub-sec. 7; ib., Sub-sec. 12; Ky. Stats., secs. 4090, 4047.)

2. The exemption from ad valorem assessment of property employed in business paying a license tax is warranted by section 181 of the Constitution as Amended. (Bamberger, Bloom & Co. v. City of Louisville, 82 Ky., 337; Levi v. City of Louisville, 97 Ky., 394; Cons. of Ky., secs. 172 and 181 prior to amendment; Cons. of Ky. sec. 181 as amended.)

3. The ordinance distinctly specifies the purpose of the tax. (City of Somerset v. Somerset Banking Co., 109 Ky., 549; 22 Ky. Law Rep., 1132; Birch v. Owensboro, 18 Ky. Law Rep., 284; 36 S. W., 12; Cahill v. Perine, 105, Ky., 531; Pulaski County v. Watson, 106 Ky., 500; Westinghausen v. People, 44 Mich., 265; 6. N. W., 641; People v. Home Insurance Co., 92 N. Y., 328; People v. Supervisors, 17 N. Y., 235; Ky. Stats., sec. 2983; Spring Valley Coal Co. v. People, 157 Ills., 543; 41 N. E., 874; Levi v. City of Louisville, 97 Ky., 394.)

4. The law does not require that the assessment and collection

Digitized by Google

of the license taxes shall be concurrent in time with the assessment and collection of ad valorem taxes. (Act of March 18, 194, section 4; L. & N. R. R. Co. v. City of Louisville, 16 Ky. Law Rep., 796.)

5. The ordinance will not result in double taxation.

6. The ordinance operates equally and uniformly upon all merchants within the same class. (Smith v. City of Louisville, 9 Ky. Law Rep., 779; Holzhauer v. Newport, 94 Ky., 407; Strater Bros. Tobacco Co. v. Commonwealth, 25 Ky. Law Rep., 1717; 78 S. W., 871; Hall v. Commonwealth, 101 Ky., 382; Magoun v. Illinois Trust & Savings Bank, 107 U. S., 283; Kentucky Railroad Tax Cases, 115 U. S., 321; Clark v. Titusville, 184 U. S., 329; State v. Carter, 129 N. C., 560, 40 S. E., 11; City of Sacramento v. Crocker, 16 Calif., 119; In Re Watson (S. Dak.), 97 N. W., 463; Williamsport v. Wenner, 172 Pa., 173, 33 Atl., 544; San Luis Obispo County v. Greenburg, 120 Cal., 300, 52 Pac., 797; Cobb v. Durham County, 122 N. C., 307; 30 S. E., 338; Burlington v. Putnam Ins. Co., 31 Iowa, 102; State v. Liverpool Insurance Company, 40 La. Ann.—, 4 Sou. Rep., 504; Cons. of Penn., sec. 1, Art. 9; Cons. of Kentucky, sec. 171; Knisely v. Cotterel, 196 Pa. 614; 40 Atl., 861, 50 L. R. A., 86.)

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

At its regular session in the year 1902 the General Assembly passed the following act (Laws 1902, p. 100, c. 50), amending section 181 of the Constitution: "An act to provide for an amendment to section 181 of the Constitution of Kentucky.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That upon the concurrence of three-fifths of all the members elected to each house, the yeas and nays being taken thereon and entered in their respective journals, section 181 of the Constitution of Kentucky be, and it is amended by adding to said section the following words: 'And the General Assembly may, by general laws only, authorize cities and towns of any class to provide for taxation, for

Digitized by Google

municipal purposes, on personal property, tangible and intangible, based on income, licenses or franchises, in lieu of an ad valorem tax thereon: Provided, cities of the first class shall not be authorized to omit the imposition of ad valorem tax on such property of any steam railroad, street railway, ferry, bridge, gas, water, heating, telephone, telegraph, electric light or electric power company,' so that said section, when so amended shall read as follows:

"'Section 181. The General Assembly shall not impose taxes for the purposes of any county, city, town or other municipal corporation, but may, by general laws, confer on the proper authorities thereof, respectively, the power to assess and collect taxes. The General Assembly may, by general laws only, provide for the payment of license fees on franchises, stock used for breeding purposes, the various trades, occupations and professions, or a special or excise tax; and may, by general laws, delegate the power to counties, towns, cities and other municipal corporations, to impose and collect license fees on stock used for breeding purposes, on franchises, trades, occupations and professions. And the General Assembly may, by general laws only, authorize cities or towns of any class to provide for taxation for municipal purposes, on personal property, tangible and intangible, based on income, licenses or franchises, in lieu of an ad valorem tax thereon: Provided, cities of the first class shall not be authorized to omit the imposition of an ad valorem tax on such property of any steam railroad, street railway, ferry, bridge, gas, water, heating, telephone, telegraph, electric light or electric power company.'

"Section 2. This amendment shall be submitted to the voters of the State for their ratification or rejection at the time and in the manner provided for

Digitized by Google

under section 256 of the Constitution of Kentucky, and under the provisions of the act of May 12, 1897, being section 1459 of the compilation of laws known and designated as the Kentucky Statutes."

The amendment was submitted to the voters of the State and was adopoted by the requisite majority. After this at its next session, the General Assembly passed the act approved March 18, 1904 (Laws 1904, p. 93, c. 33), to carry the amendment into effect. This act, so far as material, is as follows:

"An act to amend the revenue laws of cities of the first class so as to carry into effect the amendment of section 181 of the present Constitution.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"Section 1. That section 195 of chapter 244 of Session Acts of 1891, 1892 and 1893, approved July 1, 1893, and being section 2980 of the Kentucky Statutes, be, and the same is hereby repealed, and the following substituted so that said section as amended and hereby re-enacted, shall read as follows:

" 'Section 195 (2980). Each city shall raise a revenue from ad valorem taxes, and from a tax based on income, licenses and franchises, and to that end the general council of each city is hereby authorized and empowered to provide each year, by ordinance, for the assessment of all real and personal estate within the corporate limits thereof, subject to taxation for state purposes, and may levy an ad valorem tax on the same not exceeding the rate and limits prescribed in the Constitution; and for school purposes, not exceeding fifty cents on each one hundred dollars of taxable property therein; and may impose license fees on stock used for breeding purposes, and on franchises, trades, occupations and professions; and may provide for taxation, for municipal purposes, on

Digitized by Google

personal property, tangible and intangible, based on income, licenses or franchises in lieu of an ad valorem tax thereon: Provided, such general council shall not be authorized to omit the imposition of an ad valorem tax on such property of any steam railroad, street railway, ferry, bridge, gas, water, heating, telephone, telegraph, electric light or electric power company. Said council shall provide for the collection of all taxes imposed thereunder. All taxes and license fees shall be levied or imposed by ordinance, and the purpose or purposes for which the same are levied or imposed shall be specified therein, and the revenue therefrom shall be expended for no other purpose than that for which it was collected. All ad valorem taxes shall be collected by the tax receiver, and all license taxes, including all taxes on personal property, tangible and intangible, based on income licenses and franchises, in lieu of an ad valorem tax thereon, shall be collected by the secretary and treasurer of the commissioners of the sinking fund: Provided, that all taxes so collected by said secretary and treasurer in lieu of ad valorem taxes on personalty shall be paid by him monthly to the city treasurer, who shall receipt to him therefor, and the said secretary and treasurer shall furnish monthly to the city comptroller a statement showing what persons, firms or corporations have, during the previous month, paid such taxes, the amount paid by each, and the total amount paid by him to the city treasurer. Nothing in this section shall be so construed as to deprive the general council of the power hereby granted to it to provide by ordinance in its discretion for the levy and collection of taxes based on income, licenses and franchises in addition to ad valorem taxes on the property of any of the corporations whose franchise is subject to assessment

Digitized by Google

by the city assessor as set out in section three of this act, which is section one of section 2984a, Kentucky Statutes, as amended by this act, and the general council shall have power to levy ad valorem taxes on the property and franchises of railroads as assessed and apportioned by the railroad commission and the State board of valuation and assessment: Provided, that no corporation, individual, firm or association, which pays an ad valorem tax and a franchise tax shall also be required to pay a license tax.' "

Pursuant to this act the general council of Louisville adopted the following ordinance:

"An ordinance to impose licenses under the authority of section one of the act to amend the revenue laws of cities of the first class so as to carry into effect the amendment to section 181 of the present Constitution, approved March 18, 1904.

"Be it ordained by the General Council of the City of Louisville as follows:

"Section 1. Every merchant (except those mentioned in sections 2 and 12 of this ordinance) whether individual, firm or corporation, having a place of business in the City of Louisville, wherein goods, wares or merchandise are offered for sale, or are stored for the purpose of delivery on sale, shall be required to obtain a license from the commissioners of the sinking fund, and upon procuring such license shall pay therefor in proportion to the gross amount of his annual sales as follows: On the first $1,000 or less, $5.00. On every $1,000 and fraction thereof exceeding the first $1,000 and not exceeding $20,000, $3.50. On every $1,000 and fraction thereof exceeding $20,000 and not exceeding $80,000, $2.50 On every $1,000 and fraction thereof exceeding $500,000, $1.00.

Digitized by Google

"Section 2. Every commission merchant and every receiver and shipper of grain, whether individual, firm or corporation in the City of Louisville, engaged in the business of selling goods, wares and merchandise, exclusively on commission, shall be required to obtain a license from the commissioners of the sinking fund, and upon procuring such license shall pay therefor in proportion to the gross amount of annual sales as follows: If said sales do not exceed $100,000, the license fee shall be $25.00. If said sales exceed $100,000, but do not exceed $250,000, said license fee shall be $50.00. If said sales exceed $250,000, said license fee shall be $100.00.

"Section 3. Every person, whether individual, firm or corporation, manufacturing goods, wares or merchandise of any description, in the City of Louisville, and vending the same (except those persons, individuals, firms and corporations, excluded from the provisions of this ordinance under section 12 hereof), shall be required to obtain a license therefor in proportion to the gross amount of his annual sales of manufactured product as follows: On the first $1,000, or less, $5.00. On every $1,000 and fraction thereof exceeding the first $1,000, and not exceeding $20,000, $1.75. On every $1,000 and fraction thereof exceeding $20,000, and not exceeding $80,000, $1.25. On every $1,000 and fraction thereof exceeding $80,000 and not exceeding $500,000, 75 cents. On every $1,000 and fraction thereof exceeding $500,000, 50 cents.

"Section 4. It shall be the duty of each merchant and manufacturer on or before the 15th day of each August, to make a return, under oath, of the individual, member of a firm or officer or agent of a corporation, to the secretary of the commissioners of the sinking fund stating what has been the gross

Digitized by Google

amount of sales for the preceding year, from July 1st to July 1st, and it shall be competent for the commissioners of the sinking fund, if they are not satisfied as to the verity of said return to cause its secretary to give to such merchant or manufacturer ten days' notice by mail of its intention to investigate the same, at which investigation such merchant or manufacturer shall have the right to be heard and introduce evidence, and said commissioners of the sinking fund may require the production of witnesses and the books of such merchant or manufacturer before them, and they may from such return and from such books and evidence determine the amount of the license due by such merchant or manufacturer. Upon such return or upon such determination, the secretary shall give notice to such merchant or manufacturer of the amount of license so due for the succeeding year, and thereupon the said merchant or manufacturer shall pay the same to the treasurer of the commissioners of the sinking fund on or before the 15th day of the succeeding October.

"Section 5. Every bank or trust company having a place of business in the City of Louisville shall be required to obtain a license from the commissioners of the sinking fund. Every such bank and trust company shall, on or before August 15th of each year, make a return, under oath of its president or cashier, of the amount of its gross earnings for the preceding year from July 1st to July 1st. Such gross earnings shall include the entire revenue derived by said bank or trust company from every character of investment owned and business done by it, without any deduction on any account whatever, except that there shall be deducted from such revenue the amount shown by the oath of the president to have been actually paid by said bank or trust company for interest on

Digitized by Google

deposits. If the commissioners of the sinking fund are not satisfied as to the verity of such return they shall have the right to call for the production of the books of such bank or trust company, and from such returns, such books or other evidence, fix the amount upon which the license is to be paid, and give notice to said bank or trust company of such amount; and in like manner as prescribed in the preceding section, such bank or trust company may contest such increase. Thereupon, on or before the 15th day of October, the said bank or trust company shall pay to the treasurer of the commissioners of the sinking fund five per cent. upon the amount of the gross earnings less the allowed deduction as above prescribed, as fixed by the return or determination of the commissioners of the sinking fund.

"Section 6. The payment by said merchant, manufacturer, bank and trust company of the license fees herein exacted shall be in lieu of ad valorem taxes upon the personal property, tangible and intangible, of said merchants, manufacturers, banks and trust companies, employed in their respective businesses, and which would otherwise be assessed on the first day of September of the year in which the licenses are dated.

"Section 7. Each license issued under the preceding sections shall be dated on October 15th, and shall run for one year.

Section 8. Every merchant, or commission merchant, or manufacturer, bank or trust company, beginning business in the City of Louisville after the 1st day of July, in any year, shall procure a license from the commissioners of the sinking fund from the time such business shall be commenced until the 15th day of October of the succeeding calendar year, if the business is commenced between January

Digitized by Google

1st and July 1st. The amount due for such license shall be paid at once upon its being procured, and the party procuring the same shall make oath as to what his best estimate of what such license would be if estimated according to the scale herein fixed for the business about to be commenced; the commissioners of the sinking fund to have the right at any time during the currency of such license to ascertain from the books of the licensee or from such other evidence as they may be able to procure whether such estimate is a correct one, and if not correct in their judgment, they shall fix an additional amount to be paid, and notify the licensee. Thereupon such licensee shall have the right to produce such evidence as he may desire before the commissioners of the sinking fund, who shall have the right to reduce or increase the estimate so made by them.

"Section 9. The license fees collected by the treasurer of the sinking fund by virtue of this ordinance shall be paid by him monthly, to the city treasurer, who shall receipt to him therefor, and the secretary and treasurer of the commissioners of the sinking fund shall furnish monthly to the city comptroller a statement showing what persons, firms or corporations have, during the previous month, paid such taxes, the amount paid by each and the total amount paid by him to the city treasurer.

"Section 10. In default of the payment of the license taxes herein exacted at the time fixed by this ordinance, a penalty of five per cent. shall be added thereto and interest on the amount of such license taxes shall be computed and paid by the delinquent from that date at the rate of six per cent. per annum until paid. For violation of this ordinance in failing to make the report herein exacted or in doing business without the license herein required after October 15,

Digitized by Google

1905, the party so delinquent shall be subjected to a fine of not less than $25.00, nor more than $100.00 for each offense, and each day the individual, firm, or corporation is in default shall constitute a separate offense. Such delinquents shall be prosecuted by the commissioners of the sinking fund in the name of the city of Louisville, and all fines so imposed shall, when collected, be paid into the treasury of said commissioner of the sinking fund. In addition to said prosecutions the commissioners of the sinking fund may, having first given such delinquent ten days' notice by mail, require the production of the books of such delinquent, and may hear other testimony, and determine therefrom the amount of the license to be paid by the party in default and require its payment according to the provisions of this ordinance.

"Section 11. The assessor of the City of Louisville shall, in making his assessment, as of September 1st of each year, omit therefrom the personal property, tangible and intangible, of every merchant, manufacturer, bank and trust company which has complied with the provisions of this ordinance.

"Section 12. This ordinance shall not repeal or in any way affect any ordinance of the City of Louisville now in force which imposes a license tax on any franchise, trade, occupation, profession, or on any stock used for breeding purposes; nor shall it include any merchant or manufacturer, whether individual, firm or corporation, now required by ordinance to pay a license tax upon his or its trade, calling or occupation; nor shall it repeal or in any way affect the ordinance approved July 29, 1898, regarding new manufacturing plants and entitled, 'An ordinance concerning the exemption of manufacturing establishments from municipal taxation.'

Digitized by Google

"Section 13. The revenue derived from the license taxes imposed by this ordinance shall be used for the purpose of maintaining the general government of the City of Louisville, and shall be apportioned and distributed each year as the ad valorem taxes are apportioned and distributed by the general levy ordinance of that fiscal year.

"Section 14. This ordinance shall take effect from and after its passage."

Thereafter, appellants, who are citizens and taxpayers of Louisville, brought this action to restrain the city council from enforcing the ordinance, on the ground that it is unconstitutional and void. The circuit court dismissed their petition and they appeal.

Section 171 of the Constitution, among other things, provides: "Taxes shall be levied and collected for public purposes only. They shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax; and all taxes shall be levied and collected by general laws." It is insisted for appellants that the amendment of the Constitution only authorizes cities and towns to provide for taxation for municipal purposes on personal property based on income, licenses, or franchises in lieu of an ad valorem tax thereon; that it does not authorize the classification of personal property and the substitution of the license or franchise system on the property of some and not on the property of all. It is also insisted that the ordinance violates the constitutional provision securing equality and uniformity of taxation on property and is drawn to relieve the burden of the strong at the expense of the weak; that the discriminating rate is unreasonable and founded on unnatural classifications; that the ordinance does not distinctly specify the purposes for which the tax is levied, as required

Digitized by Google

by section 180 of the Constitution; that the ordinance cannot be administered under section 2969, Ky. Stats., 1903, regulating the tax for school purposes; and that the ordinance is bad, in that it fixes a level tax for each year, although the ad valorem tax may vary from year to year.

Neither the constitutional amendment nor the statute passed pursuant to it requires any city or town to provide for taxation for municipal purposes on personal property based on income, licenses, or franchises. The municipal authorities are given the option to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises. This option they may exercise or not in their discretion. The option to substitute the tax based on income, licenses, or franchises for the ad valorem tax on personal property necessarily carries with it the power to define the classes of property as to which the substitution is made; for such a substitution cannot be made as to all classes of personal property, as, for instance, the watch worn on one's person, household property, or the like. But there is nothing in the amendment to the Constitution repealing or impairing in any way the mandatory provision of section 171 of the Constitution that taxes shall be uniform upon all property subject to taxation within the territorial limits of the authority levying the tax. While the municipal legislature may under the amendment classify personal property and levy a tax ad valorem on some personal property and tax other personal property on the basis of income, licenses, or franchises, the tax must be uniform within the territorial limits of the authority levying the tax, and under the guise of substituting one method of assessment for another the burden which should fall upon all equally must not be shifted, so

Digitized by Google

as to throw upon some more of the common burden than their proper share. Of course, there must necessarily be some inequalities and some hardships when two systems of taxation are thus allowed. The law does not take into account these occasional cases. But, when the natural effect of the ordinance is to destroy that uniformity of taxation which is guaranteed by the Constitution, it cannot be enforced.

By the ordinance in question it will be observed that a sliding scale is made as to merchants and manufacturers, and that the tax decreases with the amount of the sales or manufactured product. In other words, the merchant or manufacturer of small means is made to pay a tax at a higher rate than the merchant or manufacturer of larger means. The Constitution allows no such discrimination. The rich and the poor must be taxed alike. There cannot be one rate for the large merchant and a different rate for his poor neighbor. For a number of years past the ad valorem tax rate in the City of Louisville has been in round numbers about $2 on the $100. A man with $10,000 of personal property, not a merchant or a manufacturer, would have to pay about $200 in taxes; but if a merchant or manufacturer turned over his capital two or three times a year, which is as much as may usually be expected, his taxes, under the ordinance would be from $70 to $95 a year. For a number of years past it has been difficult to secure investments of personal property which would pay 5 per cent. If a man had $10,000 invested in 5 per cent. securities, his income would be $500 a year, and out of this he would have to pay practically $200 for city taxes; but if a bank or trust company had the same investment, it, under the ordinance, would pay 5 per cent. of its income, or $25. The amendment to the Constitution does not authorize or contemplate that

Digitized by Google

the substitution of one system of taxation for the other shall in any wise affect the equality of burden which that instrument contemplates. The necessary effect of the ordinance before us is to relieve certain classes of property of their just share of the public burden, and place upon other classes of property, in addition to its proper share of the common burden, the additional burden of which the favored classes have been relieved. The city council may by ordinance provide for the taxation of personal property based on income, license, and franchises, provided the classes of property which are thus taxed are not favored and bear substantially the same part of the common burden as under the ad valorem system.

By the statute of the United States the national banks are not taxable by the states. The shares of stock may be taxed, but not at a greater rate than is assessed upon other moneyed capital in the hands of individual citizens of the State. Under the statute of the United States no tax can be levied upon national banks, based upon income, licenses, or franchises. Only the shares of stock in the national banks may be taxed, but these cannot be taxed at a greater rate than is assessed upon the State banks and trust companies. If any tax is levied upon national banks under this ordinance, it may be successfully resisted; and if any tax is levied upon the shares of stock of a national bank upon an ad valorem assessment, while the State banks are taxed under this ordinance, the assessment would be held void, for the reason that there would be a discrimination in favor of the State banks and trust companies; for in that event the national banks, when they paid upon the value of their shares of stock, would be taxed at a much higher rate than the State banks and trust companies.

Digitized by Google

The ad valorem tax in the city varies from year to year. The purpose of the ordinance seems to be to make a permanent rate for the classes named, which is unaffected by the fact that the tax rate on other property may go up or down as the years go by. This cannot be done. The tax based upon income, licenses, or franchises is simply a substitute for the ad valorem tax, and must be levied yearly according to the ad valorem levy, and in such a way as to produce practical equality between all classes of property, whenever a new ad valorem ordinance is passed.

The council may properly apportion the franchise tax between the different objects for which taxes are levied in the same proportion as the ad valorem tax is divided, and may set apart to the school fund such a per cent. of the franchise tax as 33 per cent. of the ad valorem tax bears to the whole of it.

Judgment reversed, and cause remanded, with directions to the circuit court to overrule the demurrer to the petition and for further proceedings consistent herewith.

Digitized by Google

CASE 27.—MOTION BY M. S. TYLER TO HAVE HIS FEE AS ATTORNEY ADJUDGED A LIEN ON THE FUNDS REALIZED FROM A JUDGMENT HELD BY C. AND C. B. SLEMP.—February 14, 1906.

Tyler v. Slemp, &c.

Appeal from Jefferson Circuit Court; Chancery Branch (First Division).

SHACKELFORD MILLER, Judge.

Motion overruled and Tyler appeals. Reversed.

Attorney and Client—Compensation—Lien.—Where an attorney was employed on commission to enforce a judgment, but his name did not appear on the records, and the judgment was assigned, without notice to the assignee of his employment, he was nevertheless entitled to a lien on the amount recovered, it not having been paid over, for his agreed commission, notwithstanding Ky. Stat. 1903, sec. 107, relating to the enforcement of attorneys' liens, and providing that, if the record shows the name of the attorney, the defendant shall have notice of the lien; this provision being for the benefit of the defendant alone.

CHAS. CARROLL, W. S. PRYOR and HAZELRIGG & HAZELRIGG for Appellant.

JOHNSON & HIEATT and SAMPSON & SAMPSON for Appellee.

(No briefs, record misplaced.)

OPINION OF THE COURT BY CHIEF JUSTICE HOBSON—Reversing.

In 1891 the firm of Miller, Debard & Everitt

Digitized by Google

recovered a judgment in the Harlan circuit court against the Commonwealth Land & Lumber Company for $10,196.14. It was stipulated in the judgment that $4,225 was for the use and benefit of Middleton & Pace. A lien was adjudged upon certain lands in Harlan county to secure the judgment. In 1892 Miller, Debard & Everitt and Middleton & Pace, through their attorneys, Stone & Sudduth, filed suit in the Jefferson circuit court to enforce the collection of the judgment. This suit was still pending in 1900, when M. S. Tyler was employed by Debard's executrix to look into the action and see what the prospect was of her realizing anything out of it. He made the investigation, and subsequently she sold her interest in the judgment to Middleton & Pace. After this some correspondence took place between Middleton & Pace and Tyler, which resulted in the following written contract being entered into: "This agreement witnesseth: That M. S. Tyler has this day agreed with Middleton & Pace to represent them in the suit of Miller, Debard & Everitt, etc., v. Commonwealth Land & Lumber Company, etc., No. 308, pending in the chancery division of the Jefferson circuit court, and the other suits consolidated therewith, and push the same to a conclusion as rapidly as possible. and for his services as their attorney said Middleton & Pace are to pay him a fee equal to ten per cent of the amount realized by said Middleton & Pace in said actions, the same not to be paid until or except as the same is collected. This May 2d, 1901. (Signed) M. S. Tyler. Middleton & Pace." The suit progressed until a sale of the land was had, but before the proceeds of the sale were distributed Middleton & Pace assigned all their interest in the judgment to appellees Slemp, without any notice to them of Tyler's employment, and when there was nothing of record to

Digitized by Google

apprise them of it. After their purchase Tyler entered a motion to have his fee, as shown by his written contract, adjudged a lien upon the funds realized from the judgment. Appellees objected to the motion, and, their objection having been sustained, Tyler appeals.

It is manifest that, if Middleton & Pace had remained the owners of the judgment, Tyler would, as between him and them, be entitled to the fee claimed by him under his contract. But it is insisted for the Slemps that, as they purchased without notice of his claim, he cannot assert it against them. The rule as to the purchase of a judgment is thus stated in Freeman on Judgments, section 429: "In the purchase of a judgment the rule of caveat emptor applies. If the vendor has no title, the vendee can obtain none, though the vendor, once having title, has transferred it without knowledge of his vendee. This rule is equally applicable, whether the second transfer is voluntarily made by the plaintiff or results from a levy and sale under execution." This rule was followed by this court in Miller v. Field, 10 Ky., 104; Pearson v. Talbot, 14 Ky., 435, and Mackey v. Beckel, 1 Ky. Law Rep., 67. In Columbia Finance & Trust Company v. First National Bank, 116 Ky. 364, 76 S. W., 156, 25 Ky. Law Rep., 565, the court said: "The rule of caveat emptor applies to sales of choses in action as in other sales of personal property, and if the seller has sold the thing to one person, and therefore has no title to pass to a second, the latter takes nothing by his purchase. The assignee's right of action is without prejudice to any discount, set-off, or defense the debtor has before notice of the assignment. Ky. St. 1903, section 474; Civil Code Prac., section 19. The purpose of the notice is to protect the debtor in such defenses innocently acquired. It

Digitized by Google

adds nothing to the assignee's title, which is perfect, as between him and the assignor or those claiming under him, from the time of the assignment. While the precise question appears not to have been directly passed on heretofore by this court, the principles announced lead to the conclusion indicated." See, also, Brown v. Lapp, 89 S. W. 304, 28 Ky. Law Rep. 409.

In Jones on Liens, 226, it is said: "An attorney's lien is superior to the rights of a third person who is assignee of the judgment, for the assignee has no greater equities than the assignor had; and, though the assignee had no notice of the lien, this may be enforced as against him." See, also, Gist v. Hanly, 33 Ark., 233; Sexton v. Pike, 8 Eng (Ark.), 195; and McCain v. Portis, 42 Ark., 402. In the last case, which was not unlike this, the court said: "It is obvious no one can sell a fund in court as a fund. It is not in the control of any vendor. There can be no delivery of the thing itself. One can only transfer an equitable right to his net interest in the fund when that may be adjusted, and in the adjustment all parties must contemplate that the court will, before ordering it out, subject it to all claims upon it properly brought to the notice of the court in favor of any other parties, or in favor of any officer of the court rendering services concerning the subject-matter. It is like one partner selling his interest in a particular asset, whether it be an article of property or debt due the firm. He cannot convey to any one a right in the substance, to one-half to be plucked out clean, but only a resultant interest after settlement of partnership affairs. The question here is whether, under our system, a solicitor's fee in chancery, properly claimed and brought to the notice of the court, is to be taken into the account in making adjustment of the

Digitized by Google

net interest of the party vendor. If the chancellor may do that, then the parties purchasing such interests pendente lite buy in contemplation of that, and take only that net interest so diminished."

Appellees, however, rely on section 107, Ky. St. 1903: "Attorneys-at-law shall have a lien upon all claims or demands, including all claims for unliquidated demands put into their hands for suit or collection, or upon which suit has been instituted, for the amount of any fee which may have been agreed upon by the parties, or, in the absence of such agreement, for a reasonable fee for the services of such attorneys; and if the action is prosecuted to a recovery, shall have a lien upon the judgment for money or property which may be recovered—legal costs excepted—for such fee; and if the records show the name of the attorney, the defendant in the action shall have notice of the lien; but if the parties before judgment, in good faith, compromise or settle their differences without the payment of money or other thing of value, the attorney shall have no claim against the defendant for any part of his fee."

It is insisted that, as the record of the action did not show the name of the attorney, he has no lien against the appellees under the statute. The clause of the statute relied on is for the protection of the defendant in the judgment. If the Commonwealth Land & Lumber Company had paid Middleton & Pace the money without notice of Tyler's lien, and when the record did not show his name, it would have been protected. The purpose of this provision of the statute is precisely the same as the purpose of the provision as to notice in the case of other assignments. The notice is for the protection of the debtor. But in the case at bar the money has not been paid over. The fund is yet in court, and neither Middle-

Digitized by Google

ton & Pace nor the Commonwealth Land & Lumber Company could be heard to complain of the payment of Tyler's fee, if Middleton & Pace still owned the judgment. The action was pending when Tyler was employed. The claim was put in his hands for collection when he was employed. It had been prosecuted to a recovery, and by the terms of the statute he has a lien upon the judgment. This lien in his favor is superior to the claim of the Slemps, for by their purchase from Middleton & Pace they only took such rights as Middleton & Pace then held, and Middleton & Pace at that time held the judgment subject to Tyler's lien thereon for his fee.

Judgment reversed, and cause remanded for a judgment as herein indicated.

Judge NUNN dissents.

Digitized by Google

JANUARY TERM, 1907

CASE 28.—ACTION BY J. G. FORRESTER AND OTHERS AGAINST E. S. HOWARD AND OTHERS TO ENFORCE A LIEN FOR AN ATTORNEY'S FEE ON LAND RECOVERED IN THE ACTION.—Jan. 10, 1907.

Forrester, &c. v. Howard, &c.

Appeal from Harlan Circuit Court.

M. J. Moss, Circuit Judge.

From the judgment plaintiff appeals. Reversed.

1. Judicial Sales—Vacating —Irregularities in Decree.—Defendant's land was sold under a judgment obtained by plaintiffs, who became the purchasers, and a deed was made to them. Subsequently an order was made for the purpose of supplying an omission in the record in failing to have the report of sale of the commissioner confirmed, and this order confirmed the sale and directed the commissioner to prepare another deed. Later another order was made for the purpose of correcting an error in the description of the land in the second deed, and the commissioner was directed to prepare a deed with correct description. Both orders were made without notice to defendants. Held, the substantial rights of defendants were not prejudiced or affected by the orders made.
2. Same—Confirmation.—Where the record does not show that the report of sale made by a commissioner was confirmed, an order of the court directing that a deed be made is, in effect, a confirmation of the sale.
3. Appeal—Decision Reviewable—Relating to Judicial Sale.—An order confirming a sale of land and directing that a deed be made is a final and appealable order.

Digitized by Google

4. Judgment—Vacation—Right to Relief.—Where an order is final and appealable it can be vacated or modified by an appeal to this court, or by the lower court for any of the causes specified in Civ. Code Prac. sec. 518, but in no other way.
5. Judicial Sales—Exceptions to Report—Existence of Other Remedy.—Where an order confirming a sale of land and directing that a deed be made was not appealed from nor vacated or modified under Civ. Code Prac. sec. 518, which provides the grounds on which a judgment, after expiration of the term, may be vacated or modified, an order sustaining exceptions to the report of sale was a nullity, since the court had lost control of the case.
6. Same—Conveyance to Purchaser—Presumption.—It will be presumed that the description in a deed made by a commissioner in pursuance of an order of the court followed the description of the land contained in the pleadings and judgment under which the land was sold.
7. Same—Correction of Errors.—If, by a mistake, or neglect, the description of land in a deed made by a commissioner in pursuance of an order of the court does not conform to the description of the land contained in the judgment under which the land was sold, and report of sale, the court at any time can permit its commissioner to correct the deed or make a new deed conforming to the judgment and report.
8. Appeal—Presentation of Error—Motion for New Trial—Necessity.—Where the record discloses all the facts necessary to enable the court to consider the questions of law presented, a motion for a new trial is not necessary.
9. Attorney and Client—Lien—Property in Litigation.—An attorney who defends an action in which it is sought to recover property is not entitled to a lien upon the property he succeeds in saving for his fees.
10. Judgment—Vacating—Waiver of Right.—Although so much of a judgment is erroneous as awards an attorney a lien on land for his fees, the objection comes too late when first made on a motion to vacate an order confirming the sale under the judgment directing a deed to be made.

H. C. CLAY and J. G. & J. S. FORRESTER for Appellants.

POINTS AND AUTHORITIES.

1. Fraud must be plead. (McCarty v. Payne, 5 R., 242.)
2. Power of the court over its orders after the term. (Code

Digitized by Google

Sections 344, 518; Anderson v. Anderson, 57 Ky. 18 (B. M.), 95; Hocker v. Gentry, 60 Ky. (3 Met.), 463; McGowan v. Pennybaker, 60 Ky., 501; McManama v. Garrett, 60 Ky., 517; Scott v. Scott's, Executrix, 82 Ky., 332; Kincaid's Adm'r v. Tutt, 88 Ky., 392; Oliver v. Park, 101 Ky., 1; Lovelace v. Lowell, 107 Ky., 676.)

3. Limitation 3 years. (Code Sec. 344; Anderson v. Meredith, 10 R., 460; Nickell v. Fallen, 15 R., 389.)

4. Not necessary to vacate void orders. (Stevens v. Deering, 10 R., 292; Spencer v. Parsons, 89 Ky., 578.)

5. After summons no notice of the entry of orders is necessary. (Monarch v. Brey, 106 Ky., 692; Hagood v. Riley, 21 S. C., 143.)

6. Title may pass without an order of confirmation. (Tipton v. Powell, 42 Tenn. (2 Cold.), 19; Watt v. Scott, 3 Watts (Pa.), 79; Tooley v. Gridley, 11 Miss. (3 S. & M.), 515; Henderson v. Herrod, 23 Miss., 453; Redus v. Hayden, 43 Miss., 632; Smith v. West, 64 Ala., 38; Jones v. Manly, 53 Mo., 559; Grayson v. Weddle, 63 Mo., 523; Gilbert v. Cooksey, 69 Mo., 42; Moody v. Butler, 63 Tex., 212; Loyd v. Waller, 74 Fed., 607.)

W. F. HALL and GREENE & VANWINKLE Counsel for Appellees.

POINTS AND AUTHORITIES CITED.

1. A purchaser at decretal sale acquires no right or title to the property until the sale is confirmed by the chancellor. (Taylor v. Giplin, &c., 3 Met., 544; Forman & Dana v. Hunt, &c., 3 Dana, 622; Ball, &c., v. First National Bank of Covington, 4 R., 404; Neal, &c., v. City of Louisville, 6 R., 300; Thornton, &c., v. Thornton, &c., 23 R., 930; Vanmeter v. Vanmeter's Assignee, 88 Ky., 448.)

2. The exceptions to the master commissioner's report of sale was properly sustained. (McLaughlin v. Schneid, &c., 11 R., 648; Haney v. McClure, &c., 88 Ky., 146; Phelps, &c., v. Jones, 91 Ky., 244; Dickerson's Heirs v. Talbot's Ex'rs, 14 B. M., 59; Forst, &c., v. Davis, 101 Ky., 351-2.)

3. The three orders complained of made in the case in the court below after the case had been retired from the docket were each void orders. (Thompson, &c., v. Thompson, &c., 23 R., 1538; Wilson, &c., v. House, &c., Bush, 406; Smith, &c., v. Lewis, 5 R., 427 (3); Cornelison v. Stephens, 8 R., 417 (1); Hare, &c., v. Anderson, &c., 12 R., 306; Cornelison v. Stephens, 12 R., 276; Carroll's Code, Section 763; A. & E. E. of Law, vol. 17, 825 (b); Fant, Receiver v. Kannelley, &c., 4 R., 362; Lem-

Digitized by Google

ming v. Mullins, 6 R., 509 (1); Bamberger Bloom & Co., v. Vincent, 12 R., 765; Stephens, &c., v. Deering, &c., 10 R., 393; Brown, &c., v. Vancleave, &c., 14 R., 821; Curd, &c., v. Williams, &c., 13 R., 855; Lyttle v Bach & Miller, 29 R., 424; Ky. Statutes, section 107.)

4. The grounds for a new trial: "said judgment is against both law and evidence" is too general to call the court's attention to any error committed on the trial of the cause. (Combs v. Hargis, 4 R., 446; Ohio Valley Railway, &c. v. Thomas, &c., 9 R., 508; Carlin, &c., v. Baird, &c., 11 R., 932; Jones v. Worden, &c., 12 R., 105; L. & N. R. Co. v. Coniff's Adm'r., 16 R., 296; Sellars v. Cincinnati, &c., Railway Co., 16 R., 833; Trent, &c., v. Colvin, &c., 18 R., 173; Jones v. Wocher, &c., 90 Ky., 230.)

OPINION OF THE COURT BY JOHN D. CARROLL COMMISSIONER—Reversing.

The appellants, who are attorneys, were employed by appellees to defend a suit brought against them to recover a tract of land containing 500 acres known as the "Bingham Patent." They were successful in the defense of the action, and were allowed a lien on the land for a reasonable fee. Afterwards, in 1894, they brought this suit, averring that their services were reasonably worth $300, and asked that so much of the land as might be necessary to satisfy the same be sold for that purpose. Pending this action it was agreed that one B. F. Creech owned a certain part of the 500 acres, and by an amended petition appellants sought to subject the remainder of the tract, which consisted of 133 acres, to the payment of their debt, and in 1896 a judgment was rendered in their favor for $300, and it was further adjudged that they had a lien on the 133 acres, or rather the entire 500 acres, which was described by metes and bounds, excepting that part thereof owned by Creech, which was also described in the judgment—the description of the land and the part excepted being the same in the judgment as in the pleadings. Under this judgment, the

Digitized by Google

133 acres were sold and purchased by appellants for the amount of their debt, and in November, 1896, a deed was made conveying to them the land, and a writ of possession awarded. After the writ of possession was awarded, the case was left off the docket, and the next order was made in August, 1899. This order recites that the deed of 1896 was prematurely made and is defective, and, on motion of appellants, is quashed. The report of sale made by the commissioner in 1896 was confirmed by this order, and the commissioner directed to prepare another deed conveying to appellants the land described in the former judgment, and thereupon the deed produced by the commissioner was acknowledged and approved by the court. The appellees had no notice of this order—the only purpose of which was to supply an omission in the record in failing to have the report made by the commissioner in 1896 confirmed. Again at the February term, 1905, of the court, the action on motion of appellants was redocketed, and an order entered reciting that the deed made by the commissioner in 1899 was defective in failing to correctly describe the land, there being omitted from the deed the two last calls in the description contained in the pleadings and judgment, and the commissioner was directed by this order to correct the deed in the respect mentioned, and prepare and report to the court a deed containing a correct description of the property. Thereupon the commissioner produced a deed which was examined and approved by the court, and another writ of possession was ordered. This order was also made without notice to appellees. At the July term, 1905, the appellees, after notice to appellants, moved the court to set aside and vacate the orders made in the case on behalf of appellants in 1899 and in 1905, and tendered to appellants the

Digitized by Google

amount of their debt, interest, and costs. To this motion the appellants responded, in substance, that the only purpose of the motion made in 1899 and in 1905 was to correct the omission and errors heretofore mentioned, and that the appellee E. S. Howard was then the sole owner of that part of the Bingham patent containing 133 acres, and which was subjected to their lien and conveyed to them, and that in March, 1905, E. S. Howard had leased in writing from appellants until January, 1906, the 133 acres, surrendering to them all rights and interest he might have therein. and agreeing to surrender possession at the expiration of the lease to appellants. To this response a reply was filed by appellee E. S. Howard denying that appellants were at any time given a lien on or that there was conveyed to them, the 133 acres, asserting ownership thereto in himself, and averring that the rent contract was obtained by fraud.

On the issues made by the response and reply, evidence was heard by the court, and it appears from this evidence that the 133 acres in controversy is included in, and is a part of, the Bingham 500-acre patent, and is all that remains of this 500 acres after setting apart to Creech the quantity it was agreed by the parties he was entitled to. It also discloses that, when the judgment was obtained by the appellants in 1895, this 133 acres was not worth more than $300 or $400, but that in 1905, and at the time of the trial, it was worth $1,500. The Bingham patent was not surveyed until March, 1905, and then Howard, as he testifies, learned for the first time that its lines included the 133 acres upon which he had resided for some time, although, in a deposition given by him in 1890, in the case of Bingham v. Howard, involving the ownership and title to this land, he testified that he had lived on this 500-acre tract for 30 years, and

Digitized by Google

that his father bought the tract from Elisha Bingham. It thus appears that appellee Howard knew something of the boundary of this Bingham land. The lower court entered a judgment setting aside and vacating all of the orders made in the case in 1899 and 1905, to which judgment appellants excepted, and prayed this appeal. Afterwards, in February, 1906, appellees filed exceptions to the commissioner's report of sale made in 1895. These exceptions the court sustained, and it was ordered that the report of sale be quashed and held for naught, and from this order appellants also appeal.

The substantial rights of appellee were in no wise prejudiced or affected by the orders made at the instance of appellants in 1899 or 1905. Indeed, it was not necessary that appellants should have had any of these orders made. Although the record did not show that the report of sale made by the commissioner in 1895 was confirmed, the order of court directing that a deed be made was, in effect, a confirmation of the sale, and the order confirming the sale and directing that a deed be made was a final and appealable order, and the only way that appellees could vacate or modify that order was in the manner pointed out in the Code, by appealing to this court, or having it vacated for some of the causes specified in section 518 of the Civil Code of Practice. Having failed to resort to either of these methods, their motion made in 1905 was entirely unavailing. The lower court had completely lost control of the case, and could not, by any order made in 1905, disturb a judgment or final order entered in 1895. For the same reason, the order of the lower court sustaining the exceptions to the report of sale made in 1895 was a nullity. If the deed made by the commissioner in 1895 can be found, it may be recorded in the proper office; if

Digitized by Google

not, the deed made in 1905 should be recorded. The title to the land vested in appellants when the deed was made conveying to them the land in 1895. It is to be presumed that this deed followed the description of the land contained in the pleadings and judgment, but if, by oversight or neglect, the description of the land in the deed did not conform to the description of the land contained in the judgment and report of sale, the court might at any time have permitted its commissioner to correct the deed, or make a new deed conforming to the judgment and report. To authorize this court to reverse the judgment of the lower court in vacating the orders made on motion of the appellants and in sustaining the exceptions to the report of sale, no motion for a new trial was necessary. The record discloses all the facts necessary to enable this court to consider the questions of law presented.

Our attention is also called to the fact that it was error to allow appellants a lien upon the land for their fee. This point would have been well taken if the question had been presented in proper time, and so much of the judgment as awarded a lien would have been set aside. An attorney who defends an action in which it is sought to recover property is not entitled to a lien upon the property that he succeeds in saving. Lytle v. Bach & Miller, 93 S. W. 608, 29 Ky. Law Rep. 424. But it is now too late for the appellees to complain of this error.

The judgment of the lower court vacating the orders made in the case on behalf of appellants in 1899 and 1905 and in sustaining exceptions to the commissioner's report of sale is reversed, with directions to proceed in conformity to this opinion.

Digitized by Google

CASE 29.—ACTION BY THE ADMINISTRATOR OF LEWIS WAHL AGAINST JACOB EBERHARDT AND OTHERS IN WHICH ELLA EBERHARDT THE WIFE OF JACOB EBERHARDT INTERVENED.—January 9.

Eberhardt and others v. Wahl's Admr.

124 223
e135 828

Appeal from Daviess Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Judgment for plaintiff. Defendant and intervener appeals. Reversed.

1. Husband and Wife—Transactions Between Husband and Wife —Validity as to Third Persons.—Ky Stat. 1903, sec. 2128, provides that a transfer of personalty between husband and wife shall not be valid as to third persons, unless in writing and acknowledgement and recorded as a chattel mortgage, and that a wife may make contracts and sue and be sued as a single woman. A husband executed two notes, for the same amount, to a bank to secure a loan, pledging shares of stock belonging to him as collateral to secure the first note, and the wife pledged shares of stock belonging to her to secure the second. She paid off the first note with her own means, whereupon the bank released the husband's stock. The intention was to pay the note for which her stock was pledged, and on discovering the mistake the husband delivered to the wife his shares in pledge to secure the sum she had paid for him. Held, in a suit by a creditor of the husband to discover assets, in which his stock was attached, that the agreement between the husband and wife that his stock should be held as security to indemnify her against loss not having been in writing or recorded was not enforceable as against the debt of plaintiff, but that the judgment should have subjected the husband's stock first to the payment of the amount paid for

Digitized by Google

him by the wife, and that any surplus should then be applied to plaintiff's debts.

2. Same—Actions—Burden of Proof.—Under the married woman's act, where a wife claims an interest in the husband's property by reason of a payment made by her on his behalf, the burden is not upon her to show affirmatively that the money was her separate estate.

MILLER & TODD for Appellant.

POINTS AND AUTHORITIES.

1. The transfer of a secured debt carries with it the securities by which same is secured.

2. Since the adoption of the act of March 15th, 1894, known as the Weissinger Act, a married woman has full power and authority to pledge or place in lien her property, both real and personal, to answer for the debt, default or misdoing of another, her husband included, by setting the same apart for that purpose, as provided in said act. (Kentucky Statutes, 2127; Hall v. Hall, 25th Law Reporter, 553; New York Life Insurance Company v. Miller, 22 Law Rep., 230.)

3. Since the act of March 15th, 1894, it is competent for a wife to contract with her husband, and she may take from him an obligation enforcible at law or in equity. (Price v. Price, 25th Law Reporter, 1803; Parker, Jones & Steele v. Parker, 25th Law Rep., 2193.)

4. The act of March 15th, 1894, abolished the doctrine that in a contest between a wife and her husband's creditors, the personal estate of the wife was presumed to belong to the husband in the absence of any showing on the part of the wife that it was her separate estate. (Kentucky Statutes, sections 2127 and 2128; Clark, &c. v. Meyers, 24th Law Reporter, 380.)

W. E. AND GEO. V. TRIPLETT for Appellee.

POINTS AND AUTHORITIES.

1. We contend, that appellant, Mrs. Eberhardt has no lien on the 10 shares of the stock purchased by her husband and now in her hands because, there has been no evidence introduced nor is it alleged in her answer that she had any separate estate, or that she has any means, or performs any labor by which she can make money to pay for property.

The evidence does show that Jacob Eberhardt's family consists

Digitized by Google

of only himself and wife, and that he now receives, and has been receiving, for several years, about $55.00 per month. The following cases hold that the burden of showing that money paid for property, by a wife belongs to her, as her separate property, is on the wife, otherwise it will be presumed, that it belongs to the husband. (Treadway v. Turner, 10 Ky. Law Rep., 950; Robertson v. Robertson, 13 Ky. Law Rep., 505; Ruggles v. Robinson & Co., 22 Law Rep., 437; Wahl v. Murphy, 10 Ky. Law Rep., 389; Edelmuth v. W. Bryant, 21 Ky. Law Rep., 929; Robinson v. Woolstain, 22 Rep. 883; Winginton v. Mulet, 88 S., W., 1082; Clark v. Mercer, 24 Ky. Law Rep., 382.)

We further contend that Mrs. Eberhardt has no lien on the 10 shares belonging to her husband, by reason of her having deposited her shares as collateral for the second note, because she is not liable for the debt of her husband except where she follows the provisions of the Kentucky Statute contained in section 2127. (Lyon v. Lyon, 72 S. W., 1102, 24 Ky. Law Rep., 2100; Planters Bank and Trust Co. v. Major, 76 S. W., Rep. p. 331; S. W. Travis Co. v. Wood, 20 Ky. Law Rep., page 1819; Deposit Bank of Carlisle v. Stitt, Ky. Law Rep., page 671; Postell v. Crambaugh, 23 Ky. Law Rep., page 2173.)

3. We further contend that even if Mr.s Eberhardt had paid her own money on her husband's debt, and taken his stock as collateral, the stock is still subject to his debts, because she has no enforcable claim against her husband, and could not sue him for the payment of the debt she claims against him even to enforce her alleged lien. (Lehay v. Lehay, 97 Ky., page 59; Kalfus v. Kalfus, 92 Ky., 542; Brooks Walerfield v. Frisbie, 18 Rep., page 555.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

Appellee, as judgment creditor of Jacob Eberhardt, brought this equitable action to discover assets, and attached 10 shares in the Vollman Buggy Body Company, standing in Jacob Eberhardt's name. Ella Eberhardt, wife of Jacob, intervened, claiming the the stock was in pledge to her under the following conditions: Her husband borrowed $500 from a bank to buy the stock. He executed two notes of $250 each

Digitized by Google

to evidence the debt. To secure the bank, he pledged his stock to secure the first of the notes, and she pledged 10 shares of stock in her own name to secure the second. She paid off $250 of the debt, the first note, with her own means, whereupon the bank released the husband's stock. The intention was to pay off the debt on which her stock was pledged. But, by mistake, the other note was paid off. She returned to the bank to have the mistake corrected. The bank officials told her that it would amount to the same thing if her husband delivered his shares to her in pledge to secure the sum she had paid for him, and as indemnity against loss by reason of the pledge of her own stock on the other note. Which arrangement was then made between the husband and wife. But it was not in writing, and, of course, in consequence, not acknowledged or recorded. We think the arrangement between the husband and wife was void as to third persons, and the circuit court so treated it as to the suing creditor. The judgment was to sell the stock of Jacob Eberhardt to satisfy appellee's debt, without reference to any right of appellant Ella Eberhardt. Mrs. Eberhardt appeals.

She contends that, under the existing married woman's act (section 2128, Ky. St. 1903), it is competent for husband and wife to deal with each other with respect to her property as if she were single. In that section it is provided: "A gift, transfer, or assignment of personal property between husband and wife shall not be valid as to third persons unless the same be in writing, and acknowledged and recorded as chattel mortgages are required to be recorded." This proviso follows the clause in the section: "She may make contracts, and sue and be sued as a single woman." We think the proviso as to dealings between husband and wife was intended as a qualifica-

Digitized by Google

tion of the previous general power conferred upon married women by the statute. It was recognized that their relation was one affording amplest opportunities for the practicing of fraud against creditors of either, unless their dealings with respect to their property were made the subject of public record. As they generally live together and use each other's property in common, there would be no visible change of possession to indicate a change of ownership. Persons crediting the former real owner might then be misled into believing that no change in the title had occurred, and upon the faith of such apparent condition give credit where there was not property to support it.

The Legislature, in removing the disability of married women to deal as single persons respecting their property, saw fit to so qualify the privilege as to make it conditional when the dealing was with a spouse. Unless the condition is complied with, the qualified privilege extended by the statute cannot attach. What has been said above applies alone to the transaction between Eberhardt and his wife. It must be borne in mind always in the construction of this statute that the qualification above treated of deals alone with the rights of married people in transactions between themselves. The married woman, when dealing with others, is placed with respect to her property precisely as if she were unmarried, barring alone the matter of becoming surety. Mrs. Eberhardt intended to pay off the note upon which her stock was pledged. Had that been done she would at least have released her 10 shares of stock, and as between her and her husband he would have been indebted to her on that account $250. That would have been a debt that she might have enforced against him, if he had not seen proper to adjust it voluntarily.

Digitized by Google

But she did not pay off the debt that was intended to be paid. By a misunderstanding of the officer of the bank, the first note was canceled. Let it be supposed that nothing had been done then by Jacob Eberhardt and his wife with respect to securing her in the money thus advanced for him. What would have been her rights at law? In addition to her claim against him for $250, she would have been subrogated to the rights of the bank in the note that she had discharged; that is, she would have had in lien the shares of stock owned by her husband which had been pledged to secure that note. This would have been, not because of any transaction between her and her husband, or because of any gift, assignment or transfer of his property to her, but because of the equitable doctrine of subrogation which substitutes one for another with respect to a pre-existing obligation. Mrs. Eberhardt was not a volunteer in the payment of her husband's debt to the bank. It is true she was not bound to pay it. She was not his surety on that debt, nor was her property subject to secure the $250 note that she paid. But she paid it at the instance of her husband; both of them intending that the payment should apply to the other note. The mistake might have been corrected by an application to the bank; and, if refused by the latter, it is possible that it might have been corrected in an appropriate proceeding brought for the purpose. The money having been paid at the instance of the husband to his creditor, and applied by the latter upon the wrong debt, the wife paying the money was entitled to be subrogated to the rights and liens of the debtor against the property of the husband pledged to secure the debt, without reference to any further assignment or transfer of such property to the wife.

It was formerly held before the enactment of the

Digitized by Google

existing married woman's act, that the burden of showing that money paid by a married woman for property in fact belonged to her as her separate property was upon the wife, and that, in the absence of such showing, the presumption would be that it was of that character of the wife's general estate which the husband had a right to reduce to possession, and when it was paid on his behalf it was thereby reduced to his possession. The cases holding this view are Treadway v. Turner, 10 S. W. 816, 10 Ky. Law Rep. 950; Robertson v. Robertson, 20 S. W. 543, 14 Ky. Law Rep. 505; Wahl v. Murphy, 9 S. W. 375, 10 Ky. Law Rep. 389; Edelmuth v. Wybrant, 53 S. W. 528, 21 Ky. Law Rep. 930; Ruggles v. Robinson & Co., 57 S. W. 619, 22 Ky. Law Rep. 437. These cases, however, were distinguished in Clark v. Myers, 68 S. W. 853, 24 Ky. Law Rep. 382, where it was held that under the existing married woman's act all of the wife's property is her separate estate, which her husband has no right to reduce to his possession, and, as between the husband and wife, he has no more right to her property against her consent than a stranger has. In this view of the law, it is no longer incumbent upon the married woman to show affirmatively that her personal property is her separate estate, nor is it any more necessary for her to show from whence it was derived than it would be for the husband to show the same fact were he claiming the property as his own. When she shows that her money paid the debt of her husband, and that it was paid at his instance, the law implies an obligation upon his part to repay it to her.

It follows that the judgment of the circuit court should have been to subject the 10 shares of stock of the husband, Jacob Eberhardt, first to the payment of the $250 paid for him by Mrs. Eberhardt to the bank,

Digitized by Google

together with the interest upon it from the time it was paid, and then any surplus (after deducting the item of exemption allowed by the circuit court and not necessary to be here discussed) should be applied to the debt of appellee. The agreement between Jacob and Mrs. Eberhardt that this stock should be held as security to indemnify her against loss by reason of the pledging of her shares to secure his other note, not having been in writing or recorded, is not enforceable, as against the debt of appellee.

Judgment reversed, and cause remanded for judgment in conformity herewith.

CASE 30.—ACTION BY SAMUEL FRANCIS AGAINST H. C. LILLY'S EXECUTRIX AND OTHERS SETTING UP A CLAIM TO CERTAIN LAND AND TO VACATE A JUDGMENT UNDER WHICH LILLY CLAIMED TO HAVE PURCHASED THE LAND.—January 11.

124 230
132 344
132 716

124 230
137 386

Francis v. Lilly's Executrix

Appeal from Letcher Circuit Court.

M. J. Moss, Circuit Judge.

Judgment for plaintiff, and from an order granting a motion to vacate the judgment and award a new trial the plaintiff appeals. Affirmed.

1. New Trials—Final Order—Appeals—A judgment awarding a new trial, granted after the term at which the original judgment was rendered, is a final order from which an appeal lies.
2. Courts—Jurisdiction—Conferred by Law—Recital in Judg-

Digitized by Google

ment.—A court cannot make jurisdiction for itself, it must be conferred by law. The mere recital by the court in its judgment that it has got the party before it cannot make the fact so if it is not so, and such false recital cannot create a jurisdiction which the law has withheld.

3. Action to Set Aside Judgment—Truth May be Shown—Verity of Judgment.—In a direct attack upon a judgment by suit filed to set it aside, the truth may be shown against either the sheriff's return of service or the recital of service in the judgment. The verity ascribed to judgments of courts of general jurisdiction does not attach in a direct proceeding to vacate the judgment.

4. Return of Officer—Absence of Summons—Presumptions—May be Rebutted.—The presumption that the officer did what he certifies he did, and that in the absence of a summons from the record the court had something before it to warrant the judgment are presumptions of fact, which may be overcome by evidence.

5. Void Judgment—Proceedings to Vacate—How Regulated.—Proceedings to open up a void judgment because of fraud in the obtention, or because rendered without service of process or appearance, are not governed by the Code of Practice regulating the granting of new trials, but rest upon the common law and the statutes for relief from fraud or misadventure.

DISHMAN & DISHMAN and S. B. DISHMAN Attorneys for Appellant.

GRANT E. LILLY, Attorney for Appellee.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

In a suit to settle the estate of James Hogg, deceased, which was pending in the Letcher circuit court many years ago, Judge H. C. Lilly became a party, asserting a lien on certain lands therein sought to be sold at the instance of the administrator. It was finally adjudged that Lilly had an enforceable lien. The land was decreed to be sold, and in pursuance was sold, when Lilly became the purchaser. A deed

Digitized by Google

was executed to him by the court's commissioner, and a writ of possession awarded him. The land was situated in Knott county. But the suit was begun in Letcher many years before Knott was made. In December, 1892, appellant filed this suit in the Letcher circuit court, claiming that he was the owner of the land, and in its actual possession, asserting that he had never been a party to the suit in which it was sold to Lilly, and asked that the execution of the writ of possession awarded to Lilly be enjoined. At the August term, 1893, of the Letcher court, a judgment by default was rendered in behalf of the plaintiff, appellant here, enjoining H. C. Lilly, and Watts, the sheriff of Knott county, to whom it was said the writ of possession had been directed, from executing the writ, and quieting the title of the plaintiff to the land. The judgment recites: "The defendants, H. C. Lilly and S. J. Watts, having been duly summoned herein more than twenty days before the present term of this court, and likewise served with the order of injunction herein more than twenty days before the present term of this court, the petition herein on the calling of said cause was taken as true and submitted for the court's opinion and judgment, and the court being advised from the pleadings orders and adjudges," etc. Judge Lilly died in the year 1900. In 1903 his son, who was representing the widow and sole devisee of Judge Lilly, learned for the first time that the title to the land was in dispute by Francis, and that the latter claimed it had been settled in his favor by a judgment of the Letcher circuit court The records were then examined, and, no summons being found with the files of the suit, a motion was made, on notice, in this action to redocket it, and to vacate the judgment because it was void, having been rendered without process against, or appearance of,

Digitized by Google

the defendants. The notice and motion contained the grounds of attack. No issue was joined by pleading, but it seems to have been assumed that the averments of the notice and motion were traversed. The burden was taken by the defendant, the movant, and proof for and against the motion was heard. The defendant (appellee) also tendered an answer to the action of Francis v. Lilly, etc., traversing its averments, and pleading certain other matter in estoppel, which constituted a good defense to that action. The circuit court, upon the hearing, found and adjudged that summons had not been served upon the defendants, that the judgment rendered by default in August, 1893, was void, and it was consequently vacated. The answer of Lilly's executrix was allowed to be filed. From the order setting aside the judgment and awarding a new trial of the action of Francis v. Lilly, the plaintiff, Francis, prosecuted this appeal.

A judgment awarding a new trial, granted after the term at which the original judgment was rendered, is a final order, from which an appeal lies. Tyler v. Wiggington, 11 Ky. Law Rep., 367; Snyder v. Cox, 53 S. W. 263, 21 Ky. Law Rep. 796; Turner v. Johnson, 35 S. W. 923, 18 Ky. Law Rep. 202; Williams v. Williams, 107 Ky. 496, 21 Ky. Law Rep. 1208, 54 S. W. 716. Appellant takes the position that the recital of service in the judgment, together with the lapse of time, and the habit and practice of courts of general original jurisdiction of rendering judgments, raise a presumption as to the verity of the fact of service that is not and cannot be overcome by the negative evidence shown by a failure of the record to contain the sheriff's return. The courts take two views of this subject: One is that public policy requires that there be accorded an absolute verity to the judgments of courts of general jurisdiction; that

Digitized by Google

they should be accepted as having found and adjudged every necessary antecedent fact to exist upon which their right to proceed to the exercise of their jurisdiction depended. These courts hold that, where the court actually decides the fact to be that the defendant has been served with process in the case, it is as clearly within its province to determine it as is any other fact in the case; and that its judgment thereon ought to be as conclusive as upon any other fact which may be adjudged. They hold that the security of titles and the welfare of society are best conserved by the adherence to the rule which ascribes an absolute verity to the judgments of such courts, relying upon their integrity and care to not proceed to a judgment unless the defendant is before the court, even though, in rare instances, by some oversight or even fraud, the rights of a particular person may be concluded without his having had an opportunity for a hearing. And this view of the subject seems to be favored by a vast majority of the American courts, and has the indorsement of Judge Freeman in his treatise on Judgments. Sections 131-134. The other view of it is that the court cannot make a record at all until, and unless, it has jurisdiction of the parties and the subject-matter of the suit, and that, if the parties are not before the court by process or appearance, the enrolled proceedings are of no more effect than scrap paper; that the law contemplates, upon reasons of natural justice, that no man shall be deprived of any of his natural rights of person or property without an opportunity of being heard. It is said no court can make jurisdiction for itself; it must be conferred by the law; that, until the parties are before the court, it is powerless to determine their rights of property or person, because the law withholds the jurisdiction to do so until the liti-

Digitized by Google

gants are brought before the court; and that the mere recital by the court that it has got a party before it, cannot make the fact so if it is not so, and that such false recital cannot and ought not create a jurisdiction which the law has withheld. The tendency of the decisions of this court seems to have been toward the view last stated. The divergence noted above is in the application of the principle to collateral attack upon such judgments. But all seem to concur in, or at least are not necessarily in conflict with, the view that, upon a direct attack upon a judgment in an action brought directly in the court rendering it, to impeach and annul it, the austere construction contended for by the first-class of cases does not apply. All seem to agree that for fraud practiced by the plaintiff, or upon non-service or non-appearance of the defendant, the latter may have the judgment set aside in a direct proceeding for the purpose. And that is what this case is. There are most cogent reasons why such judgments ought to be immune from collateral attack, but which have no place in just thinking and right dealing, when the party sought to be bound by them is attempting in the proper forum to have them set aside so that they may not conclude him wrongfully.

An examination of some of the Kentucky cases will show the trend of this court's holding on the subject. Taylor v. Lewis, 2 J. J. Marsh. 400, 19 Am. Dec. 135, holds that, where the sheriff returns the summons as executed, when in fact it had not been, and judgment was rendered by default, the defendant is concluded; that his remedy is an action against the sheriff for his wrong. The original judgment was obtained at law. The attack was by a suit in equity to set aside

Digitized by Google

the judgment at law, on the ground that the defendant had not been summoned or appeared in the action. At that time that was the only method of opening up a judgment at law after the term of court at which it was rendered. The opinion is criticised by Freeman in his note to the case, page 137, 19 Am Dec., who said of it, "it can hardly be considered the prevailing rule at the present day." Taylor v. Lewis, supra, was followed and approved in Shoffet v. Menifee, 4 Dana, 150. In each of these cases the plaintiff was without fault. The two foregoing opinions were departed from, though noticed, in the subsequent case of Bramblett v. McVey, post. In Chambers v. Handley, 4 Bibb, 284, a judgment at law was vacated by a direct proceeding in equity upon the showing that the summons had been falsely returned as executed. having been procured by the fraud of the plaintiff, by which a default judgment against the defendant was obtained. Whether the default judgment could have been collaterally attacked upon the same ground was not discussed. Thomas v. Ireland, 88 Ky. 581, 11 Ky. Law Rep. 103, 11 S. W. 653, 21 Am. St. Rep. 356, followed and applied the principle of Taylor v. Lewis, supra, but in that case one defendant had procured the sheriff to falsely note the service of the summons on a co-defendant without the knowledge of the plaintiff. In Robinson v. Mobley, 1 Bush, 196, the judgment recited: "The defendant having been duly summoned and failing to answer," judgment by default was rendered. There was no summons in the record. On appeal it was held that the recital in the judgment was not evidence of the service. But it was furthermore held that it was a clerical misprision to enter the judgment before the service of the summons, an error which must be called to the attention of the trial court first before an appeal will lie. On

Digitized by Google

the latter point—that of clerical misprision—this case was expressly overruled in Long v. Montgomery, post, but left intact otherwise. In Long v. Montgomery, 6 Bush, 394, there was a judgment by default. The record did not show any summons. The decree recited that the summons had been served in due time. There was no appearance by the defendant. On appeal it was held that the judgment was void, affirming Robinson v. Mobley; that the recital in the judgment that process was duly served was of no effect. In Bramblett v. McVey, 91 Ky. 151, 12 Ky. Law Rep. 760, 15 S. W. 49, which was an indictment for trespass, the summons was returned executed on the defendant, John W. Bramblett, who not appearing, judgment was rendered upon verdict by default. He brought an action to set aside the judgment, upon the ground that the summons had never, in fact, been executed upon him. It was held that no one should be precluded from showing, in a direct attack against a judgment rendered against him upon return of summons reciting that it was executed, that it had not been in fact executed; whether the falsity existed through fraud of a party or the mistake of the officer. Taylor v. Lewis, supra, and Shoffet v. Menifee, supra, were held to be no longer authority to the contrary. The case of Bramblett v. McVey was also in the Superior Court on appeal, where the same conclusion was reached as in this court. 11 Ky. Law Rep. 849. In Howse v. Reeves, 76 S. W. 513, 25 Ky. Law Rep. 949, on appeal it was held that the court could not render judgment against a defendant not summoned or appearing, and that an appearance by an unauthorized attorney did not confer such authority.

From these causes, the rule in Kentucky is found to be that, in a direct attack upon a judgment by suit filed to set aside the judgment, the truth may be

Digitized by Google

shown against either the sheriff's return of service, or the recital of service in the judgment, and by appeal that the recital in the judgment, to the effect that summons had been duly served, will not supply service; and, if the truth be that the defendant had never been served with summons, or proceeded against with warning order, or had not entered his appearance by authorized attorney or in person, the judgment by default will be set aside. This is not a collateral attack upon the judgment. The verity ascribed to judgments of courts of general jurisdiction does not attach in a direct proceeding to vacate the judgment. The presumption is that the officer did what he certifies he did, and that he did it at the time and in the manner required by law, unless his certificate shows to the contrary. The presumption may be, further, in the absence of a summons from the record, that the court had something before it to warrant its judgment. But these are not irrebuttable presumptions, nor are they presumptions of fact to be weighed against evidence. They merely place the burden of proof upon him who attacks them to overcome them by evidence.

This brings us to consider the proof in the case. Appellee shows that her testator, H. C. Lilly, lived, and had lived for 40 years, at Irvine, the county seat of Estill county, 125 miles or more through the country from Whitesburg, the county seat of Letcher county. He had been circuit judge of the district, including Letcher and Knott counties, for the term ending January, 1893. He was a painstaking, careful, and successful lawyer and business man. He had been prosecuting his claim against this property with persistency for many years, showing no intention of abandoning it. He held the last term of the Letcher court in November of 1892, closing it on December

Digitized by Google

2, 1892. Thence he went to Hindman, the county seat of Knott, and held his last term in that county beginning December 5, 1892. The petition was prepared by attorneys, one of whom resided at Whitesburg, some months before December, 1892, but it was not filed till December 8, 1892. It is indorsed: "Summons and 2 copies and injunction and 2 copies issued to Knott county, December 8, 1892. R. B. Bentley, clerk." As a matter of fact it is clearly shown that the injunction was not then granted, and no copies were issued at all for some months later. The indorsement is in the handwriting of one of plaintiff's counsel, though signed by the clerk, and was evidently made in anticipation of what was expected to be done. Plaintiff was not present when the petition was filed. But the attorney says he gave the summons and copies to one Amburgy, who was present as a friend, who was a kinsman of plaintiff, and who took the process to Knott county, and, he says, delivered it to some officer to be served, but he does not remember to whom he gave it, and does not know whether it was in fact served.

Defendant introduced the coroner of Knott, the jailer, and a number of constables of that county, all of whom knew Judge Lilly, but none of whom had ever had any summons or other process against him, and, of course, therefore, never served any. Watts, the then sheriff, who was joined as a defendant, testified that no summons or other process in the case had been served on him at any time. He is a disinterested witness. It was as necessary and as easy to have served him with the process in Knott, where he lived, as to have served Judge Lilly there. The fee for serving summons on each was the same. The copy of the order of injunction granted some months later was served on Judge Lilly by the sheriff of Estill

Digitized by Google

county, the place of his residence, but the sheriff testified that he served no summons on him. The law requires the circuit clerks to enter the return of officers executing summons in the docket of the court. Such was the general practice of the clerk of the Letcher court, but the docket being produced showed no return at all in this case, though returns were entered in 8 or 10 other cases, appearances at the same term. Grant E. Lilly, son of H. C. Lilly, an attorney for defendant, testified that plaintiff claimed to him that he had sent the summons to Estill county to the sheriff to be served, but it is seen that the sheriff said he had no such process. Plaintiff did not offer to explain or contradict this testimony. As Judge Lilly was leaving the Knott court at its close, one of its officers rode with him to the next county. Judge Lilly then placed this land in the care of this friend, with directions to keep off trespassers. Nothing was said of the suit. All this shows as clearly as it seems possible to prove a negative under the conditions existing in this case, that there had never been an execution of the summons on the defendants.

On the other side, Judge Dishman, one of counsel for plaintiff, testifies that he drew the default judgment in the case. He is known to be a careful and painstaking lawyer. He says his custom was always to see to it that summons was served before preparing such judgments for entry, but that he has no recollection of having seen the summons or return in this case. Plaintiff's other counsel says that he did see the summons. We quote from his testimony: "Q. State whether or not the process issued on the petition was ever returned, and, if so, whether or not it was indorsed as having been executed on the defendants H. C. Lilly and J. T.

Digitized by Google

Watts, or either of them? A. Yes, sir; it was returned, and it was indorsed executed on both of the above-named defendants. Q. Did you see that process after it was returned and so indorsed? A. Yes, sir. Q. State whether or not that process was returned and indorsed as having been executed on both the defendants and in the papers at the time the judgment was prepared, at the August term, 1893. A. The process was returned, and showed that it had been executed on both the defendants at the February term, 1893, but I do not remember about that particular thing at the August term, 1893. I remember that at the February term, 1893, Mr. Simeon Johnson claimed that he represented Mr. Lilly, and he had the case passed at the February term, 1893, for the purposs of, he said, preparing a motion to have the case transferred to the Knott circuit court, and got the case passed for that purpose, and, when he got the case passed, we submitted the case to the court and got the injunction or temporary restraining order to hold down the execution of the fieri facias until there were further steps taken in the case, and then at the August term of the court they did not take any further steps, and we made a motion to take the petition as true, and it was submitted to the judge." There is nothing here showing who executed the summons. It is not enough to say that the summons "was indorsed as having been executed." Indorsed by whom? Executed where and when? This testimony fails to state such facts as from them the court could say that it was a legal service, or a service at all. It may have shown that it was served by a private citizen, without authority, yet it would have shown that it was served, in the language of the witness. The return, to be evidence of service, must have been

Digitized by Google

signed by an officer authorized by law to serve a summons. Proof of the service is the officer's return or certificate. Proof of the return, if the certificate is lost, would be the testimony of some one who saw it, and who stated its contents, including its signature. This testimony, therefore, falls short of proving the return or the service at all. We do not discredit the statements of the counsel who testified. All they said may be accepted as true, still, they produce no evidence whatever of the legal service of the summons.

We have seen that the recital in the judgment is not evidential. It follows that the circuit judge was warranted in holding that the defendant had not been summoned in the case.

As to the action of the attorney, Johnson, there is no authority shown, or attempted to be shown, for his appearance, even if the witness' recollection of that matter is not at fault at this late day. Furthermore, he is shown to have been a near kinsman of plaintiff, and a kinsman of the people whom Judge Lilly had been in litigation with for so long over this title, facts known to Judge Lilly. Mr. Johnson did not reside at Whitesburg, but, if he then lived in Kentucky at all (he had, for some years been in the West), he was residing at Pineville, probably 75 miles from Whitesburg. Judge Lilly had two sons who were then practicing lawyers of many years' experience—one or both of them had been his partners—and who lived at Irvine, or near there. These facts, we think, negative the probability of Mr. Johnson's having been authorized to appear for Judge Lilly in the case. Besides, the record shows no step whatever or appearance by Johnson.

Proceedings to open up a void judgment because of fraud in its obtension, or because rendered without service of process or appearance, are not governed

Digitized by Google

by the Code of Practice regulating the granting of new trials, but rest upon the common law and the statutes for relief from fraud or misadventure. Newland v. Gentry, 18 B. Mon. 666; Stevens v. Deering, 9 S. W. 292, 10 Ky. Law Rep. 393; Spencer v. Parsons, 89 Ky. 577, 11 Ky. Law Rep. 769, 13 S. W. 72, 25 Am. St. Rep. 555; Riglesberger v. Bailey, 102 Ky. 608, 19 Ky. Law Rep. 1660, 44 S. W. 118.

There was no plea of limitation to the proceeding.

Perceiving no error, the judgment awarding appellee a new trial is affirmed.

CASE 31.—ACTION BY DANIEL E. O'SULLIVAN'S TRUSTEE IN BANKRUPTCY AGAINST J. J. DOUGLASS AND OTHERS.—January 9.

O'Sullivan's Trustee v. Douglass

Appeal from Jefferson Circuit Court, Chancery Branch (First Division).

SHACKELFORD MILLER, Judge.

Judgement for defendants. Plaintiff appeals. Reversed.

1. **Bankrupts—Salary of City Official—Fraudulent Assignment—Delaying Creditors.—Under the bankrupt law an assignment by a city official of his salary within four months prior to filing his petition in bankruptcy with intent to hinder or delay his creditors is fraudulent, and in order to protect purchasers three things must concur: (1) Their own good faith, (2) a consideration passing at the time, and (3) it must be a fair equivalent of the thing purchased.**

Digitized by Google

2. Same.—An assignment of his salary by a city official to one who did not pay or agree to pay a consideration therefor. made within four months prior to such assignor's filing his petition in bankruptcy, is void as to the creditors of the assignor, and such salary remains the assets of the bankrupt and passes to his trustee unless exempt to the bankrupt under the laws of this State.
3. Attachment of Salary.—The salary of a city official may be attached for his debts.
4. Prior Adjudication — Absence of Collusion — Conclusiveness of Judgment.—Where the liability of a debtor's salary to the payment of his debts has been adjudicated in a court of competent jurisdiction which was not collusive, the subsequent bankruptcy of the debtor and appointment of his trustee cannot open that question for litigation in the absence of an allegation of collusion in the parties in obtaining the judgment.

WILLIAM W. CRAWFORD and EMILE STEINGFIELD, Attorneys for Appellant.

POINTS AND AUTHORITIES.

1. Salary assigned by a bankrupt within four months prior to the filing of the petition in bankruptcy is recoverable by the trustee in bankruptcy, where no present, fair consideration was given for the assignment. (Section 67, Subsection (e) National Bankruptcy Act.)

2. Salary assigned by a bankrupt with intent to delay, hinder and defraud creditors is recoverable by the trustee from the assignee, even when the latter paid a full consideration, when such intent was known to the assignee or should have been known by him. (Hoffman v. Leslie, 23 Ky. Law Rep., 1982; Carter & Co. v. Richardson, 22 Ky. Law Rep., 1204; Wadsworth v. Williams, 100 Mass., 126; Harrison v. Jacques, 22 Ind., 210; Pulliam v. Newberry's Adm'r, 41 Ala., 171; Robinson v. Holt, 39 N. H., 561; In Re Moody, 134 Fed., 631; Toof v. Martin, 13 Wallace, 40;)

3. Money paid a bankrupt by a debtor after the filing of the petition in bankruptcy is no bar to a suit by the trustee to recover the debt. (Mueller v. Nugent, 184 U. S., page 411; International Bank v. Sherman, 101 U. S., 407; Stevens v. Mechanics' Bank, 101 Mass., 109; Mays v. Manufacturers Bank, 64 Pa. St.)

4. In order to sustain a claim for exemptions, all the require-

Digitized by Google

ments of the Statute must be pleaded and proved, and before money can be set aside as exempt in lieu of articles not on hand, it must be affirmatively shown that none such is on hand. (Lawson v. The S. T. Barlow Co., 21 Ky. Law Rep., 308; Commonwealth v. Burnett, 19 Ky. Law Rep., 1837.)

WILLIAM FURLONG Attorney for Appellees.

POINTS AND AUTHORITIES.

A sale or transfer of his monthly salary by an insolvent debtor for a full and valuable consideration is not prohibited by the bankruptcy act. (Law and Proceedings in Bankruptcy, Loveland, pages 384, 389; Stewart v. Platt 101, U. S., 731.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

Daniel E. O'Sullivan, an official of the City of Louisville, whose salary was $208.33 per month, being insolvent, and considerably in debt, assigned his salary for the month of January, 1905, to appellees. He did the same for the month of February, 1905, and for the first 22 days of March, 1905. On the last-named date he filed his petition to be adjudged a bankrupt in the United States District Court for the Western District of Kentucky. The assignments of the salary for January and February were made about the last of each month. For March the assignments were made daily. O'Sullivan received nothing contemporaneously with the assignments. But after the salary lists for the months had been allowed by the city and its warrants issued, appellees then paid them to O'Sullivan in full, retaining no commission. A few days after the January salary had been assigned, a creditor of O'Sullivan, William Kelday, having a judgment and execution returned no property found, filed his petition in equity for a discovery of assets. The city was made a defendant. It answered, disclosing that O'Sullivan had previously

Digitized by Google

assigned his salary for that month to appellees. Thereupon appellees were made parties defendant, it being charged that O'Sullivan had assigned the salary claim to them to hinder and delay his creditors. They answered, claiming that the assignment to them was for full value, and that they were innocent purchasers without notice of O'Sullivan's unlawful purpose, if he had such, in assigning it. Upon slight preparation that case was submitted, and the judgment was rendered in favor of appellees.

When the payments were made by appellees to O'Sullivan, they knew his creditors had attached; knew he was insolvent; paid him nothing, and did not bind themselves to pay him anything, for the salary claims. They were friends of O'Sullivan, and we think the record shows their purpose was to aid him in preventing his creditors from subjecting his salary to their debts. This was a violation of the bankrupt statute. Sub-section "e" of section 67 of that statute (Act July 1, 1898, c. 541, 30 Stat, 564 (U. S. Comp. St. 1901, p. 3449) reads: "That all conveyances, transfers, assignments, or encumbrances of property, or any part thereof, made or given by a person adjudged a bankrupt under the provisions of this act, subsequent to the passage of this act and within four months prior to the filing of the petition, with the intent and purpose on his part to hinder, delay or defraud his creditors, or any of them, shall be null and void as against the creditors of such debtor, except as to purchasers in good faith and for a present fair consideration; and all property of the debtor conveyed, transferred, assigned, or encumbered as aforesaid shall, if he be adjudged a bankrupt, and the same is not exempt from execution and liability for debts by the law of his domicile, be and remain a part of the assets and estate of the bankrupt and shall pass

Digitized by Google

to his said trustee, whose duty it shall be to recover and reclaim the same by legal proceedings or otherwise for the benefit of the creditors." Where one is insolvent he may sell what he has, of course, but he is not allowed to give it away in prejudice of his creditors' rights. So, people dealing with an insolvent must bear in mind the policy of the law that a man must pay first and give afterwards. If that is true as to gifts, it ought all the more bear good as to sales for less than a fair value. They partake of the nature of gifts in that they were without consideration to the extent that the property exceeds in value what is received for it, but they have not even the graciousness that distinguishes a bestowal by voluntary gift. Fraud enters to vitiate the transaction, for the purpose, in the case of a failing debtor, is, in the eye of the law, to defraud, and the purchaser no less than the seller participates in it—the latter possibly driven by necessity, the former most likely by greed. Each is charged with liability for the act. It is unlawful and is denounced by the statutes of the United States and of the State. But where one, to enable a failing debtor to conceal his assets to defeat his creditors, pays full value for the article having notice of the fraudulent purpose—for that is what the statute deems it to be—he violates the statute. Huffman v. Leslie, 66 S. W. 822, 23 Ky. Law Rep. 1982. It should be marked that purchasers who are protected by this statute are those who act in good faith and pay a present fair consideration. Three things must concur to protect them: (1) Their own good faith; (2) a consideration passing at the time of their purchase; and (3) it must be a fair equivalent of the thing purchased. Here appellees were not purchasers in good faith, nor did they pay a present consideration for the thing purchased. They did not then pay anything, or

Digitized by Google

bind themselves to pay anything at all events. Their purchases were void as to creditors of O'Sullivan. And furthermore, under the statute, the thing so dealt in remains assets of the bankrupt, and passes to his trustee, whose duty it is to reclaim and recover the asset, unless it was exempt to the bankrupt under the laws of the State.

The salary for February assigned to appellee passed to the trustee upon the debtor's becoming bankrupt within four months thereafter, and it should have been adjudged to appellant, although it had been previously paid over to the debtor by his assignee.

As to the March salary (that part earned prior to the filing of the petition in bankruptcy), it was not paid to O'Sullivan till after he filed his petition in bankruptcy. Nor had appellee then paid him anything on it, although it had been frequently assigned by the debtor to appellees. But whether it was owing by the city or appellees to O'Sullivan, it passed to the trustee in bankruptcy upon the filing of the petition, and neither could subsequently pay it save to the trustee so as to discharge the liability. Appellees in fact collected it from the city. They then held it as the property of the trustee, and should have paid it only to him. The rule on this subject is thus laid down in International Bank v. Sherman, 101 U. S. 407, 25 L. Ed. 866 (and confirmed recently in Mueller v. Nugent, 184 U. S. 1, 22 Sup. Ct. 269, 46 L. Ed. 405): "The filing of the petition was a caveat to all the world. It was, in effect, an attachment and injunction. Thereafter all the property rights of the debtor were ipso facto in abeyance until the final adjudication. Those who dealt with his property in the interval between the filing of the petition and the final adjudication did so at their peril."

Digitized by Google

Nor was O'Sullivan entitled to any of this money or property as an exemption, so far as this record shows. It is true, he testified that he was a citizen of this Commonwealth, with a family of three persons. But he did not show what other property he had. In order for this to have been exempt, he would have had to show that he was entitled to it under the statute in lieu of something else that was specifically exempt, but was not on hand, and for which the law allowed a substitution. Money is not exempt under the statute; neither is a chose in action. Certain enumerated articles are exempt, including enough provisions to support the family of the debtor for one year, but, if not on hand,, then other property to the value of not exceeding $40 for each member of the family may be set apart to make up the deficiency of exempt provisions. There is no evidence in the record as to what provisions this debtor had on hand, or as to what other personal property he then had; nothing to entitle him to the exemption in this case, beyond the fact that he was a resident with a family and said he needed this money to keep them up. Furthermore, there was no plea of exemption in the case. True, O'Sullivan pleaded that his salary was exempt from attachment or execution, because the salary of a public official could not be attached. This was upon the supposed ground that public policy forbids the attachment of such salaries. And, if true, it would be so without reference to what property such debtor-official may have owned. But the proposition is not true. The salary of a city official may be attached for his debts. Bridgeford v. Keenehan, 8 Ky. Law Rep. 268; Speed v. Brown, 10 B. Mon. 109; Rodman v. Musselman, 12 Bush, 355, 23 Am. Rep. 724. There was no plea of exemption on the ground that the debtor had

Digitized by Google

not enough provisions on hand to support his family one year. There was, therefore, neither pleading nor proof to support an adjudication of any exemption in his favor.

The court is of the opinion that, for the salary of February ($208.33), and for March up to the filing of the petition in bankruptcy $152.70), the trustee is entitled to recover of appellees. But for the January salary a different question is presented: The liability of appellees to account to O'Sullivan, and to his creditor, Kelday, for this sum on the ground that it did not belong to appellees, had been litigated in a court of competent jurisdiction, and adjudged in favor of appellees. The litigation was not collusive. The judgment of the court settled the title to this fund as between the parties, and decided the identical questions of fraud, valuable consideration, and notice of the debtor's intent that are involved in this case. We think the judgment is conclusive. Ordinarily one judgment is not a bar to another proceeding unless it not only presents the same subject-matter of the litigation, or cause of action, but is between the identical parties and in the same right. Appellant, the trustee, was not a party to the Kelday suit, but the bankrupt was. There was then no trustee in bankruptcy; hence the title was in the bankrupt himself. The judgment of the court divested him of it—at least adjudged that he did not have it and that appellee did. The subsequent bankruptcy of the debtor and appointment of his trustee cannot open up that question for litigation again, in the absence of an allegation of collusion among the parties to obtain the former judgment in the State court. The trustee is a privy in the estate to the debtor, and takes his property subject to such rights as the debtor himself had, barring his own frauds.

Digitized by Google

Wherefore, the judgment of the circuit court is reversed, and cause remanded, with directions to enter judgment in conformity herewith.

Whole court sitting except JUSTICE BARKER.

CASE 32.—ACTION BY A. W. JOHNSON AGAINST MARY E. MIVELAZ TO ENFORCE A MECHANIC'S LIEN FOR BUILDING A CEMENT SIDEWALK.—Jan. 11.

Mivelaz v. Johnson

Appeal from Jefferson Circuit Court, Chancery Branch (Second Division).

SAMUEL B. KIRBY, Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Mechanics' Liens—Statement of Claim—Description of Property—Sufficiency.—A statement of a claim for a mechanic's lien described the property sought to be subjected as beginning at a point 647½ feet south of P. street, and extending southwardly from this point 26 feet and 4 inches. The property intended to be covered was in fact situated 637½ feet south of P. street, and extended from this point southwardly 26 feet and 4 inches. The value of the 16 feet and 4 inches of the property intended to be covered, included in the description in the statement, was much greater than the claim. Held, that the inaccuracy in the description did not invalidate the lien under Ky. Stat. 1903, sec. 2468, requiring the filing of a statement of a claim for a mechanic's lien containing a description of the property intended to be covered sufficiently accurate to identify it.
2. Same—Name of Owner.—A claimant for a mechanic's lien, who incorrectly states the name of the owner of the prop-

Digitized by Google

erty sought to be subjected, is not deprived of his right to enforce such lien under Ky. Stat. 1903, sec. 2468, requiring the statement filed thereunder by mechanic's lien claimants "to state the name of the owner, if known," since the claimant could not lose his rights by being mistaken in the name, as the statute only required it, if known.

3. Same—Right of Subcontractor—Waiver of Right—Accepting Note from Main Contractor.—The fact that a subcontractor accepted a note from the main contractor for the amount of his claim did not affect his right to enforce his mechanic's lien against property of the owner.

E. L. McDONALD for Appellant.

POINTS AND AUTHORITIES.

1. The court erred in sustaining the demurrer to the third paragraph of appellant's answer, which showed that appellee did not intend to claim a lien upon her property, and authorized Barnes, the original contractor, to represent to appellant, the owner of the property, that no liens were, or could be, claimed upon her property, which representation was made to appellant and relied upon by her in making her final settlement with Barnes. (Grainger & Co. v. Patterson, 25 Ky. Law Rep., 2387; Nall v. Alford, 105 Ky., 664; Vrooman v. Turner, 69 N. Y., 280; Herman on Estoppel, pages 1047, 1055, 1069, 1075, 897; Phillips on Mechanic's Liens, page 966.)

2. The court erred in sustaining the demurrer to the second paragraph of the answer of appellant, which showed that the description of the lot in the statement of lien filed by appellee did not include any portion of the lot upon which appellee worked. The work done by said appellee being the construction of a pavement, which lay entirely outside of the description given by him in his statement of lien. (Amer. & Eng. Enc. of Law, vol. 20, pp. 418, 421; Phillips on Mechanic's Liens, sections 378, 390; Holmes v. Hutchins, 38 Neb., 601; Bell v. Bosche, 41 Neb., 853; McDonald v. Lindall, 3 Raleigh, Penn., Muto v. Smith, 175 Mass., 175; Lemly v. LaGrange Iron and Steel Co., 65 Mo., 645; Williamette Steam and Lbr. Co. v. Kremer, 25 Pac. (Cal.) 1226; Barnett's Executrix v. Murray, 62 Mo., 500; Foster v. Cox, 123 Mass., 45; Cowie v. Ahrenstedt, 1 Wash. State, 416; Whittier, &c., v. Stetson, &c., 33 Pac., 393; Howell v. Zerbee, 26 Ind., 214; City v. Irwin, 46 Ind., 438; Maynard v. East, 13 Ind. App., 432; Wright v. Beardsley, 69 Mo., 548; Kellogg v. Littell, &c., 1 Wash. State, 407; Lindley v. Croos, 31 Ind., 109; Runey v. Rea, 7 Oreg., 130.)

Digitized by Google

CASES DISTINGUISHED.

Cleverley v. Moseley, 148 Mass., 284; Kennedy v. House, 41 Pa. State, 40; Williamette S. M. Co., 94 Cal., 208.

3. The statement of mechanic's lien filed by appellee is fatally defective and insufficient to support his claim of lien, by reason of the fact that it states the name of the owner of the property to be Mary "Mulvin" instead of Mary Mivelaz, the correct name: Ky. Stats., sec. 2468; Am. & Eng. Enc. of Law, vol. 20, page 384; Phillips on Mechanic's Liens, sec. 345; Jones on Liens, sec. 1397; McElwee v. Sandford, 53 How. Pr., 89; Mayes v. Ruffner, 8 W. Va., 384; Waters v. Johnson, 96 Northwestern (Mich.) 504; Sprague Inv. Co. v. Mouat Libr. & Inv. Co., 60 Pac. (Colo.), 179; Sawyer-Goodman Co. v. Nagle, 110 Ills., App., 178; Russell v. Hayner 130 Federal; Am. & Eng. Enc. of Law, vol. 20, p. 384; Phillips on Mechanic's Liens, sec. 120; Newport-Dayton Lbr. Co. v. Lichdenfeldt, 24 Ky. Law Rep., 1969.)

CASES DISTINGUISHED.

Santa Cruz Rock Pavement Co. v. Lyon, 65 Pac. (Cal.), 59; McPhee v. Litchfield, 145 Mass., 565; DeKlyn v. Gould, 165 N. Y., 288.

4. The evidence shows that the work done by appellee was substantially finished more than six months before the filing of his statement, and that the only work done within said period was repairing damage which had occurred to the work during the winter. No lien can therefore be claimed for the original work, nor can it be claimed for the repairs, because they were not done under express contract. (Phillips on Mechanic's Liens, sections 18, 322, 324, 327; Hardin v. Marble, 13 Bush, 358; Am. & Eng. Enc. of Law, vol. 20, pp. 398, 400; Fay v. Muhlker, 1 Misc., N. Y., 321; Noye Mfg. Co. v. Flouring Mills Co., 110 Mich., 161; Frankovitz v. Smith, 34 Maine, 403; Schulenberg v. Vrooman, 7 Mo. App., 133; Scott v. Cook, 8 Mo. App., 193; 134 Pa. State, 558; McKelvey v. Jarvis, 87 Pa. State, 414; King v Ship Building Co., 50 Ohio State, 320; Hartle v. Richardson, 91 Maine, 424; Baker v. Fessenden, 71 Me., 292; Congden v. Kendall, 53 Neb., 387; Avery v. Butler, 30 Ore., 287; Berry v. Turner, 45 Wisc., 105; Sanford v. Frost, 41 Conn., 617; Dayton v. Minneapolis R. & I. Co., 63 Minn., 48; Dunn v. McKee, 37 Tenn., 657.)

Upon the proposition that a sub-contractor is not allowed a mechanic's lien for work done under an implied contract. (Ky. Stats., sec. 2463; Rudd v. Littell, 20 Ky. Law Rep., 158; Phillips on Mechanic's Liens, sec. 120.)

Digitized by Google

5. The court erred in refusing to allow appellant credit on the claim of appellee by the amount of credits due to Barnes, the original contractor. (Ky. Stats., sec. 2468.)

D. MO LEY, attorney for appellee.

1. The plea of estoppel relied on by appellant is wholly insufficient. The fact that appellee accepted from Barnes a note for his labor did not relieve appellant from liability to appellee for his work or in any way affect his lien therefor.

2. The real defense is the mistake in the name and description made in the statement filed in the clerk's office. These mistakes were referred to and corrected in the petition and judgment, as the authorities hold are necessary.

3. Extraneous evidence may be introduced to correct a statement, and it is held that if no injury is done to a third party the inaccuracies of the statement are immaterial, and a statement which would not be good as to a third party is good as against the owner of the property.

4. Technicality ought not to be exercised against a mechanic's lien, and all mistakes that can, with reason be corrected, should be done in the interest of justice, in a court of equity.

5. The statute places the owner of property on which work is done on notice, and payments made to the contractor are at peril as to the sub-contractor.

AUTHORITIES CITED.

Williamette S. M. Co. v. Kremer, 94 Cal., 208; Cleverly v. Moseley, 134 Mass., 284; Kennedy v. House, 41 Pa., 40; N. W. Pavement Co. v. Norwegian Seminary, 40 Minn., 450; Culmer v. Clift, 14 Utah, 286; Smith v. Johnson, 2 MacArthur, D. C., 481: Poclock v. Morrison, 76 Mass., 83; Am. & Eng. Ency. of Law, vol. 20, p. 421; McPhee v. Littlefield, 145 Mass., 566; Corbett v. Chambers, 41 Pac., 875; Santa Cruz Pav. Co. v. Lyons, 65 Pa., 331; Kelly v. Laws, 109 Mass., 396; Hodges & Campbell v. Avidson, 23 Ky. Law Rep., 2078; Hightower v. Bailey & Kevner, 22 Ky. Law Rep., 88; Bell v. Bosche, 41 Neb., 855.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Mary E. Mivelaz made a contract with R. A. Barnes to build for her a house and granitoid sidewalk in

Digitized by Google

front of her lot on the east side of Third street in the City of Louisville. Barnes made a sub-contract with A. W. Johnson for the granitoid work. Johnson did the work. Mrs. Mivelaz paid Barnes the whole amount she owed him under the contract, but Barnes did not pay Johnson. The amount due Johnson was $70. He thereupon filed his statement in the county clerk's office and brought this suit asserting a lien upon the property. The circuit court adjudged him a lien, and Mrs. Mivelaz appeals.

It is insisted for appellant that the statement filed by Johnson in the county clerk's office is not sufficient to give him a lien on the property. Section 2468, Ky. St. 1903, is as follows: "The liens mentioned in the preceding sections shall be dissolved unless the claimant, within six months after he ceases to labor or furnish materials as aforesaid, files in the office of the clerk of the county court of the county in which such building or improvement is situated, a statement of the amount due him, with all just credits and set-offs known to him, together with a description of the property intended to be covered by the lien, sufficiently accurate to identify it, and the name of the owner, if known, and whether the materials were furnished or the labor performed, by contract with the owner, or with a contractor or sub-contractor, which shall be subscribed and sworn to by the person claiming the lien, or by some one in his behalf.

The material part of the statement filed by Johnson, in so far as it is claimed to be defective, is as follows: "Affiant, A. W. Johnson, says that he is a mechanic in the business of making cement sidewalks, and that during March, 1903, he furnished the material and the labor to lay a granitoid sidewalk on the following described lots in the City of Louisville under contract with R. A. Barnes, and as a contractor

Digitized by Google

of said R. A. Barnes, who was a contractor for said work for Mary Mulvin. He says that the said property belongs to Mary Mulvin and is situated on the east side of Third street. Beginning at a point six hundred and forty-seven and one-half (647 1-2) feet south of P street, extending thence southwardly along the east line of Third street twenty-six feet and four inches, and extending back easterly in parallel lines of the same width as front and at right angles with Third street, one hundred and eighty-eight (188) feet. to an alley."

The property of Mrs. Mivelaz was in fact situated 637 1-2 feet south of P street, extending thence southwardly along the east line of Third street 26 feet and 4 inches, and running back at right angles to the street. It will be observed that in the statement the property is described as beginning at a point 647 1-2 feet south of P street, and extending from this point 26 feet and 4 inches; so that the statement in fact included 16 feet and 4 inches of the lot, and did not include 10 feet of it, but included 10 feet of other property. It will also be observed that the name of the owner of the property is given in the statement as "Mary Mulvin," and not as "Mary Mivelaz." In all other respects the statement complies with the statute. How the mistake occurred in the name of the owner is not explained by the proof; nor does it seem clear how "Mivelaz" could have been corrupted into "Mulvin." Mrs. Mivelaz has been in no way prejudiced by the mistake. She had paid Barnes before the statement was filed. No third person is interested in any way. The mistake in the description of the lot, in writing "647 1-2" for "637 1-2," does not seem to us sufficient to defeat the lien. The statement shows it was a lien for building a sidewalk in front of a lot on the east side of Third street, hav-

Digitized by Google

ing a front of 26 feet and 4 inches, and that the sidewalk was built under a contract with R. A. Barnes, who was a contractor for the work for Mary Mulvin. If there had been no mistake in the owner's name, it is reasonably clear that no one could have been misled as to what property was intended. It does not appear that there is any such person as Mary Mulvin, or that any property in this vicinity is owned by any one who could have been taken for Mary Mulvin. The name of the contractor is given, and Mrs. Mivelaz is the person who contracted with him.

It is a matter of common knowledge that foreign names are often pronounced very differently from the way they are spelled, and it is often difficult to spell the name from the way it is pronounced. The mechanics who do work as sub-contractors are not as a rule expert spellers, and should not be held to a high standard in the spelling of proper names. The statute only requires the name of the owner to be given, if known. The purpose of the statute is to require only of the claimant a statement of the name, if he knows it; and he does not lose his claim where it turns out that he was mistaken in the name. He is no more affected by a mistake in the name than he would be if he gave as the owner the person who was reputed to own the property, and it should turn out that another person owned it. In 20 Am. & Eng. Ency. of Law, p. 424, the rule is thus stated: "Where the statute only requires the name to be given, if known, if the name is not known, the statement is sufficient, although it is silent upon the subject." The courts have shown great reluctance to set aside mechanics' liens merely for loose descriptions, for the reason that the statutes are designed for the aid of the mechanics and that they usually prepare their

Digitized by Google

own papers. There are numerous cases where mistakes in statements as important as those before us have been held not to affect the lien. See Willamette S. M. Co. v. Creamer, 94 Cal. 208, 29 Pac. 633; Kennedy v. House, 41 Pa. 39, 80 Am. Dec. 594; Pollock v. Morrison, 176 Mass. 86, 57 N. E. 326; McPhee v. Littlefield, 145 Mass. 566, 14 N. E. 923, 1 Am. St. Rep. 482; Corbett v. Chambers (Cal. Sup.), 41 Pac. 875.

This is not a case where the description indicates a different property from that intended to be subjected. It is simply a case where part of the property sought to be subjected is not included in the description, and where the value of the part in fact included is largely greater than the claim. In 20 Am. & Eng. Ency. of Law, p. 522, the rule is thus stated: "The lien is not invalidated merely because it describes more land than the lien can lawfully cover. Nor is it defeated by a failure of the description to cover as much property as it might have covered. Failure to describe properly a portion of the premises or improvements upon which the lien is claimed will not invalidate the lien as to the portion correctly described." We therefore conclude that the chancellor properly sustained the lien.

The fact that Johnson had accepted a note from Barnes did not affect his rights. Mivelaz v. Genovely (Ky.), 89 S. W. 109, 28 Ky. Law Rep. 203, 121 Ky. 235. The circuit court properly sustained the demurrer to the paragraph of the answer pleading an estoppel, for the reason that it was not averred that any representation was made to Mrs. Mivelaz, or that she was induced by any representation to follow the course that she did. On the whole evidence we do not see that the chancellor made any error in refusing to allow the credits claimed.

Judgment affirmed.

Digitized by Google

CASE 33.—PROCEEDINGS BY J. E. BLADES AND OTHERS TO ENJOIN THE CITY OF FALMOUTH FROM COLLECTING THE TAXES FOR 1905.—January 11.

Blades v. City of Falmouth

Appeal from Pendleton Circuit Court.

LEWIS P. FRYER, Circuit Judge.

Injunction refused and plaintiff appeals. Affirmed.

1. Municipal Corporations—Taxes—Time for Making Levy.—Section 3644, Ky. Stats., 1903, governing fifth-class cities, provides that the council shall provide a system for the assessment, levy, and collection of city taxes, which shall conform as nearly as the circumstances permit to the laws in reference to the assessment, levy, and collection of State and county taxes, "except as to times for such assessment, levy and collection." Section 3645 provides that the list as corrected by the board of equalization "shall be the assessment roll for said tax for said year." Held, that a council of a city of the fifth class was authorized to make the levy for the collection of taxes for a year on the assessment made that year, and was not compelled to make the levy the year previous in accordance with the method used by counties.
2. Same—Taxation System.—Section 3644, Ky. Stats., 1903, governing fifth-class cities, provides that the council shall provide by ordinance a system for the assessment, levy, and collection of all city taxes, not inconsistent with the provisions of that chapter. Held, that a failure of a council to provide such a system would only invalidate acts in the assessment, levy, and collection of taxes, not authorized by the statute governing fifth-class cities.
3. Same—Appointment of Assessor.—Where an assessor is appointed by the council of a fifth-class city in 1904, it is not necessary to reappoint him in 1905 in order to make his assessment for that year valid, as section 3619, Ky. Stats., 1903, governing fifth-class cities, provides for the appointment of an assessor for the term of two years.
4. Same—Appointment of Clerk as Assessor.—Section 3744, Ky.

Digitized by Google

Stats., 1903, governing fifth-class cities, provides that the acceptance by one in office of another office incompatible with the one he holds shall vacate the first office. Section 3746 provides that no person shall at the same time fill two municipal offices. Held that, if the offices of clerk and assessor are incompatible, the appointment of the clerk to the office of assessor vacates the office of clerk, but does not invalidate the acts of the assessor.

5. Same—Oath before Assessment—De Facto Officer.—Where a city assessor omits to take the statutory oath before making an assessment, his acts are those of a de facto officer and binding on the city and taxpayers, particularly where his assessment is revised and approved by the board of equalization, the members of which were sworn.

APPLEGATE & CLARK for appellants.

We base our claim upon the following propositions, to-wit:

1. Cities of the fifth class are required by their charter to levy taxes for any year upon the assessment made as of September 1st of the year previous; and, therefore, appellant's property assessed for the first time in 1905, and not liable to assessment prior thereto, can not be subjected to levy for 1905 taxes.

2. The assessment of September, 1905, is illegal because,

(a) It was not made by the proper officer.

(b) And because the city of Falmouth had failed to provide by ordinance a system for the assessment, levy and collection of taxes, as is required by its charter, section 3644 Kentucky Statutes.

AUTHORITIES CITED.

Kentucky Statutes, sections 3621, 3644, 3645, 3655; Constitution of Kentucky, sections 165, 228; Muir's Adm'r v. City of Bardstown, 27 Ky. Law Rep., 1150; Town of Springfield v. Peoples Deposit Bank, 111 Ky., 105; Cooley on Taxation, pages 352-354; City of Latonia v. Meyer, 27 Ky. Law Rep., 746.

JOHN H. BARKER, attorney for appellee.

POINTS AND AUTHORITIES.

1. "All real and personal property within the city, and all personal estate, except such tangible personal property as has an actual bona fide situs without the city, of persons domiciled or actually residing in the city on the 15th day of September

Digitized by Google

in the year in which the assessment shall be made . . shall be subject to assessment and taxation for all local and municipal purposes, etc." (Ky. Stats., section 3654.)

2. Under the provisions of charters of cities of the fifth class, no time is fixed when the city levy shall be made. The time of the levy is therefore left entirely to the discretion of the city council. It may be made in the same year in which the assessment is made, or it may be made later, but the "correct assessment" must be the assessment roll for said tax for said year. That is to say the tax levy for the year 1905 must have been made upon the 1905 assessment though the levy may, in fact, not have been made until in the year 1906.

3. The Board of Equalization "shall have the power to hear complaints and to correct, modify or strike out any assessments made by the assessor. (Section 3645.) By this provision appellants are given a complete remedy.

4. Neither the office of city clerk or city assessor is an elective office. Each is appointive and neither is referred to in or recognized by the State Constitution. The city clerk or the city assessor, under the provisions of section 3619 may, though appointed for a term of years, be removed at the pleasure of the city council.

5. If we grant that there is an inconsistency in the acceptance of the office of assessor by the city clerk it does not affect the office of assessor, but it does vacate the office of clerk.

AUTHORITIES CITED.

Kentucky Statutes, sections 3654, 3645, 3655, 3629, 3619, 3746, 3744; 96 Kentucky, 627; A. & E. Ency., vol. 5, page 96; 3 Bush, page 90.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Prior to April 16, 1905, the appellant resided near to and owned property adjoining the city of Falmouth (a city of the fifth class). On the date mentioned the circuit court of that county made an order, in an action brought for that purpose, extending the limits of the city that included the property of the appellants, within the limits of the city. Immediately after the 15th of September of that year the property of the city including the appellants, was assessed or listed

Digitized by Google

for taxation by the city assessor. The city council appointed a Board of Equalization, who met on the first Monday in December, and revised and corrected the list, and made it the assessment roll for taxes for that year; which tax list was placed in the hands of the city marshal for collection as provided in section 3629, Ky. Stat., 1903.

The appellants instituted this action against the city and the Marshal, and sought to enjoin the collection of the taxes upon the ground that the assessment of the property for that year, 1905, was void. First for the reason that their property was assessed by the city clerk; in other words, the person who assessed the property was the city clerk, and the law prohibits one person from holding two municipal offices at one and the same time, and that his act in assessing the property, for that reason, was void. Second, that the assessor was not sworn before making the assessment. Third, that the city council had no right or authority to make the tax levy in December, 1905, for that year; that the only effect of such levy was for the collection of taxes for the succeeding year; that the levy for the collection of 1905 should have been made after the assessment of 1904, which could not have imposed a burden upon their property, for the reason that it did not become a part of the city until the month of April thereafter.

It appears that the council did not make the levy after the assessment of 1904, and no levy was made until December 11, 1905. An ordinance making the levy was passed as follows, to-wit:

"The city council of the city of Falmouth, Ky., do ordain as follows:

"1. That there be levied a tax of fifty cents on each one hundred dolars worth of taxable property in the city of Falmouth, Ky., for the year 1905, for the pur-

Digitized by Google

pose of paying the expense and indebtedness of said city.

"2. That a tax be levied of ten cents on each one hundred dolars worth of taxable property in the city of Falmouth, Ky., for the year 1905, to create a sinking fund for the purpose of paying water works improvement bonds and interest on same as they fall due.

"3. That said taxes be paid to Ezra Loomis, Marshal, on or before December 26, 1905; after said date a penalty of six per cent will be added and collected on all unpaid taxes.

"This ordinance to be in force and effect from and after its passage and publication."

The determination of this question must be controlled by the statutes governing fifth-class cities. Section 3654, Ky. St. 1903, as far as material, we quote: "All real and personal estate within the city * * * on the 15th day of September in the year in which the assessment shall be made * * * shall be assessed at its fair cash value," etc. Section 3645, Ky. St. 1903, defining the duties and powers of the Board of Equalization, and the list to be made by the board, reads as follows: "The corrected list for taxes shall be the assessment roll for said tax for said year." It shall be certified by the clerk, who shall act as clerk of the board of equalization, as being the assessment roll for said tax, and shall be the assessment roll upon which said tax is to be levied in said year." The language of this statute appears to authorize the council to levy the tax for the year in which the assessment is made.

The counsel for appellant refers to the method used by the counties and state in the levying of taxes; that is, in levying in one year for the collection of taxes in the succeeding year; but this is governed by other

Digitized by Google

provisions of the statutes. In our opinion the section last referred to, and the preceding section (3644), expressly authorizes the council to make the levy for the collection of taxes for the year 1905, upon the assessment made that year. It is provided by the last section cited that: "The city council shall have power, and it shall be its duty, to provide by ordinance a system for the assessment, levy and collection of all city taxes, which system shall conform as nearly as the circumstances of the case may permit, to the provision of the laws of this State in reference to the assessment, levy and collection of State and county taxes, except as to times for such assessment, levy and collection, and except as to the officers by whom such duty shall be performed." It will be observed that this section requires cities of the fifth class in reference to the assessment, levy. and collection of State and county taxes, to be governed by State laws, except as to the time for such assessments, and the time for the levy and the time for the collection. Therefore, the council was not required to make the levy in 1904, for the taxes for the year 1905. As stated, the time for making the levy was left to the discretion of the city council. The appellant contends that the city council of Falmouth had failed to provide by ordinance a system for the assessment, levy, and collection of city taxes; and for that reason it was without authority to make the levy. It is true that by this statute it was the duty of the city council to so provide; and if it had undertaken to perform any act in the assessment, levy, and collection of taxes not authorized by the statute with reference to fifth class cities, then its acts would have been erroneous.

The statute says that in providing a system for the purpose mentioned, it shall not be inconsistent with

Digitized by Google

the provisions of that chapter; clearly meaning that the provisions of the statute with reference to the assessment, levy, and collection of taxes could not be changed in any particular by the system provided by ordinance by the city council. As we construe the statute, all the acts of the city and its officials with reference to the assessment, levy, and collection of the taxes conform to the provisions prescribed in the chapter referred to. The assessor who assessed the property of the city the year 1905, was appointed by the council in the year 1904; it was not necessary for the city council to reappoint him in 1905. Section 3619, Ky. St. 1903, provides that the assessor shall be appointed for a term of two years by the city council; but the appellant contends that he was the clerk at the time of his appointment. It is provided by section 3746 that no person shall at the same time fill two municipal offices, either in the same or different municipalities. By section 3744 it is provided that the acceptance by one in office of another office or employment incompatible with the one he holds shall operate to vacate the first. Conceding that the position of clerk and assessor are incompatible, the acceptance of the position of assessor only had the effect to vacate or deprive him of the first office, the clerkship. Conceding that the assessor omitted to take the statutory oath before he made the assessment, it did not have the effect to make the assessment void, especially when the Board of Equalization, who were sworn, revised, corrected, and approved the assessment. If the assessor was not sworn, his acts in making the assessment had all the force and effect of a de facto officer, and were binding upon the city and the tax-payers thereof.

For these reasons, the judgment of the lower court is affirmed.

Digitized by Google

CASE 34.—ACTION BY J. T. BARNETT'S ADM'R AGAINST THE PENN MUTUAL LIFE INSURANCE COMPANY. Original opinion filed November 2, 1906; second opinion, January 15, 1907.

Penn's Mutual Life Ins. Co. v. Barnett's Adm'r.

Appeal from Jefferson Circuit Court, Chancery Branch (Second Division).

SAMUEL B. KIRBY, Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

Insurance—Life Policy—Lapse—Paid-up Insurance.—After payment of twelve annual premiums there was a lapse of a life policy providing that if it lapsed after payment of two annual premiums the company would extend the full amount insured by the policy for such time as the full reserve would carry it, or would grant paid-up insurance, payable at death, for an equitable amount; and if such lapse was after payment of five annual premiums, the paid-up policy should be for as many twentieth-parts of the sum insured as there had been annual premiums paid. Before the lapse insured borrowed money of the insurer on his note, giving the policy as col lateral security, the note providing that if it was not paid at maturity the insurer could ascertain the cash value of the policy, and cancel it, and with the cash surrender valuo pay the loan, and with the balance credit insured with as much paid-up insurance as such balance would purchase at the then age of insured. Held, that on settlement of the policy, which should be at the time of its lapse, insured had the right to a paid-up policy for twelve-twentieths of the original policy, and the insurer had no right to deduct from the amount with which a paid-up policy should be bought, 25 per cent. of the reserve, and enough to continue the original policy till the note was due and interest thereafter to accrue, in addition to the princi pal of the note and the interest thereon to date.

Digitized by Google

Penn's Mutual Life Ins. Co. v. Barnett's Adm'r.

ON REHEARING.

1. Insurance—Paid-up Policy—Surrender Charge—Carroll's Ky. Stats., 1903, section 659, provides, in relation to life insurance, that in case of default of any premium on a life policy, after three years' premiums have been paid, the policy shall be binding on the company for the amount of paid-up insurance which according to the company's published tables of single premiums, the net value of the policy on such anniversary and the dividends thereon computed by the rule pointed out by the statute will purchase as a net single premium for insurance maturing and terminating at the time and in the manner provided in the original policy, provided that the reserve of such paid-up insurance shall not be less than two-thirds of the reserve of the original policy. Held, that the statutes do not warrant an insurer charging a surrender charge in issuing paid-up insurance on a defaulted policy; a contention that one-third of the reserve is not to be applied to the purchase of paid-up insurance being untenable.
2. Usury—Notes.—Where insured in a life policy borrowed money of the insurer on his note, giving the policy as collateral security, and the note provided that, if it was not paid at maturity, the insurer might ascertain the cash value of the policy and cancel it, and with the cash surrender value pay the loan, and with the balance credit insured with as much paid-up insurance as the balance would purchase, the note, in so far as it attempted to allow the insurer to charge a surrender charge in issuing the paid-up insurance, was usurious.

THOS. W. BULLITT and A. SCOTT BULLITT for appellant.

POINTS AND AUTHORITIES.

1. The stipulation in Barnett's $1,000 note, viz.: that if the note was not paid at maturity the policy should be canceled, the note paid out of the cash surrender value and the balance applied to the purchase of paid-up insurance, never became operative. It is, therefore, wholly immaterial to this controversy whether it is valid or void.

2. The note for $1,000, to secure which Barnett assigned his policy to the Penn Mutual, was an "outstanding liability under the policy," and Barnett was not entitled to exercise the "option" given by the second non-forfeiture clause unless nor until that note should have been "first paid off."

3. By the express terms and within the true intent of the

Digitized by Google

second non-forfeiture clause, Barnett was not entitled to exercise the "option" given therein, because he did not "within sixty days" after the lapse of his policy make "written application" therefor and "surrender all claims" thereunder, including anv claim for extended insurance under the first non-forfeiture clause.

4. Even if the "sixty days" limit, prescribed in the second non-forfeiture clause of the policy, be construed, not as fixing the time within which an "option" is to be exercised, but as giving a "reasonable time" within which to make the "written application" and "surrender" therein provided for, yet Barnett did not comply with that condition, and thereby lost any supposed right under said clause to demand paid-up insurance payable at death.

5. The "assignment" by Barnett to Penn Mutual of his policy, as collateral security for the payment of his $1,000 note, did not relieve him from the duty of making written application and a surrender of all other claims thereunder, as a "condition precedent" to receiving paid-up insurance, payable at death, for twelve-twentieths of the face of the policy.

6. The Penn Mutual did not "elect" for Barnett to give him paid-up insurance in the sum of $3,000, nor in any manner "waive" its right to insist that, as a "condition precedent" to receiving such insurance, Barnett should first have made "written application" therefor, and have "surrendered" his right to "extended insurance" under the first non-forfeiture clause.

7. A valid agreement was made between the Penn Mutual and Jonathan T. Barnett in September, 1897, whereby, in settlement of all rights under the policy, Barnett accepted a release from his note of $1,000 and received paid-up insurance payable at death for $215.

8. The stipulation in the note for its payment out of the cash surrender value of the policy is not void as usurious or as involving a forfeiture, but the same is valid, being in strict accord with the policy of the statute law of Kentucky.

AUTHORITIES.
(Cited or reviewed.)

Goodman v. Mass. Mutual, etc., 73 N. Y., 480; Worthington v. Charter Oak Ins. Co., 41 Conn., 416; Mutual Benefit Life v. First National Bank, 24 Ky. Law Rep., 580; Mutual Benefit Life v. First National Bank, 115 Ky., 757; Mutual Life of New York v. Jarboe, 102 Ky., 80; Washington Life Ins. Co. v. Miles, 112 Ky., 743; New York Life v. Warren, 25 Ky. Law Rep., 325; Mutual Life of Kentucky v. O'Neil, 25 Ky. Law Rep., 983; 21 Encyc. of Law, 931; Stembridge v. Stembridge, 87 Ky., 91; McGoffin v. Holt,

Digitized by Google

1 Duvall, 95; 19 Encyc. of Law, 84; Hexter v. U. S. Life Ins. Co., 91 Ky., 357; Northwestern Mutual v. Barbour, 92 Ky., 427; New York Life v. Curry, 115 Ky., 100; Crutchfield v. Union Central Life, 113 Ky., 53; Ky. Statutes, sec. 659.

JAMES T. A BAKER and JOHN ROBERTS, attorneys for appellant.

PROPOSITIONS DISCUSSED.

1. The proposition as to a paid-up policy after five payments, in effect, is a covenant to pay Barnett's estate three thousand dollars upon his death. See: (Montgomery v. Phoenix Mutual Life Insurance Company, 14 Bush, 58.)

This is made clear without the presumption of law against the insurance company, but this court, in case of Sun Life Insurance Company v. Taylor, 22 Law Reporter, page 38, throws the weight of presumption against the company. "Provided" when inserted in a deed, may be either a condition or a covenant. (American & English Encyclopedia, vol. 17, page 298. And a chancellor will not enforce a forfeiture when compensation can be made. St. Louis Mutual Life Insurance Company v. Grigsby, 10 Bush, 307; Montgomery v. Phoenix Life Insurance Company, 14 Bush, 58.)

2. The company in the case at bar, as in these cases, had always in its possession ample security to pay the note for which the policy was pledged.

3. It will be insisted that the note for which the policy was pledged to secure payment did not change the policy. The provisions of the note looking to the ascertainment and application of the policy were absolutely void, because the assignment of the policy made a mortgage which left an equity of redemption in the assignor, of which he could not be deprived, without sale by decree of court or by private sale upon notice. (Hart v. Burton, 7 J. J. Marshall, 322; Honore v. Hutchings, 8 Bush, 690: Curry & Bro. v. New York Life Insurance Company, 24 Ky. Law Rep., 1930; Alexander v. Rodriquez, 12 U. S. Reports.)

4. The stipulation in the policy to pay when so many as five annual premiums are paid the proportion that the payments bear to twenty payments is a contract in writing and is barred by the limitation of fifteen years. Therefore, there is no room for the chancellor to interfere to adjudge what is a reasonable time.

5. It is only when the time provided for is shorter than the provision in the statute of limitations that the chancellor will or can interpose to declare that the stipulated time is unreasonable, and having the power to decide that the time stipulated is too short he has the correlative power to determine what is a

Digitized by Google

assigned his policy as collateral security for the repayment of the sum to the company. The note contained the following provision: "* * * it is agreed that, if said loan be not paid at maturity, the company is hereby authorized, with or without notice to the undersigned, to ascertain (according to its rules for the purchase of policies), the cash value of said policy, to cancel and annul the same, and, with the cash surrender value thereof, pay this loan note and any interest and costs that may be due on the same, and with the balance, if any, purchase and pass to the credit of said policy, on the books of the company, as much paid-up non-participating insurance (payable as the policy is, payable), as the amount will purchase at the then age of the insured; or apply the said balance according to the terms of the policy." The premium due April 6, 1897, was not paid, and by its terms, as said before, the policy lapsed. It is admitted that, at that time, the reserve fund on the policy due the insured amounted to $1,506.25, and the appellant, without notice to the insured, appropriated $33.75 of this fund to carry the policy to September 27th, the day the note fell due. On that day the company, without the knowledge or consent of the insured, made a settlement of the matter in this way: It first arbitrarily deducted 25 per cent of the total reserve, leaving $1,138.34; from this it deducted $33.75, the charge for carrying the policy from April 5 to September 27, 1897, and $1,000, the amount applied to payment of the note, which left, according to its calculation, $104.59 with which to purchase non-participating insurance payable at his death. Barnett was then 51 years of age, and the company reported to him that the balance of the reserve to his credit would purchase a policy for $215. The insured died in the year 1903, whereupon the appellant company

Digitized by Google

offered to pay to his administrator $215, which he refused to accept, and instituted this action for an adjudication of his rights under the policy. Appellee claims that, under the terms of the policy, his decedent, on the 6th day of April, 1897, when the policy lapsed, was entitled to paid-up insurance for twelve-twentieths of $5,000, which amounted to $3,000. This was controverted by appellant, claiming that the terms of the note, which was executed for $1,000, changed the terms of the policy. The lower court adopted appellee's view, and rendered judgment in his favor for the $3,000, subject to a credit of the note for $1,000, with interest, leaving the judgment in favor of appellee for $1,802.

It seems to us that the appellant was entitled to have a settlement of the policy when it lapsed; it was not obligated to await the death of the insured before adjusting the same; by so doing the interest on the note might have exceeded the value of the policy, and it would have lost money as a result. The rights of the parties were not changed by reason of the fact that the insured died within a few years thereafter. A true basis for the settlement is to ascertain the actual cash value of the policy at the time it lapsed, April 6, 1897, considering the age of the insured and his expectancy of life under the mortality table; from that sum deduct the debt of $971.50, owed by the decedent, reduced by reason of payment of interest in advance. The balance would have been due to the assured. However, as the parties have treated this case upon another principle, and, as the result reached is practically the same, we will determine it upon the method fixed in the pleadings and proof. We do not think appellant had the right to deduct 25 per cent of the reserve of $1,506.25; nor did it have the right to

Digitized by Google

apply the $33.75 for the purpose of continuing the policy. This reserve, which belonged in full to the insured, after deducting the amount due on the note at the time the policy lapsed, April 6, 1897, would have purchased a non-participating policy, payable at the death of Barnett, for the sum of $1,104.50, and for this sum appellee is entitled to a judgment, with interest from the 10th day of September, 1903, until paid.

For these reasons, the judgment is reversed, and remanded, for further proceedings consistent herewith.

RESPONSE TO PETITION FOR REHEARING BY CHIEF JUSTICE O'REAR.

Appellant asks a modification of the opinion delivered herein on November 2, 1906, on the ground that the court while applying principles of law not further disputed, was in error in the application of the facts. The petition states as a fact, and quotes with assurance, certain testimony noted below, the practice of appellant and "all other standard life insurance companies," in applying the reserves of lapsed policies to the purchase of paid-up insurance, that the companies retain 25 per cent of the reserve as a surrender charge, and apply only the 75 per cent remainder, less indebtedness to the company, in buying paid-up insurance. It is also stated, in the petition for rehearing and in the testimony alluded to, that this practice is warranted by and in line with the Kentucky Statutes on this subject. In the original opinion it was said that this deduction of 25 per cent of the reserve was irregular and unauthorized. It is argued in response that the court is in error in

Digitized by Google

ignoring a practice by appellant which the statutes of this State warrant.

The testimony alluded to is the deposition of Mr. Jesse J. Barker in the record, as follows: "Here it seems necessary to explain what is meant by 'reserve' and 'cash surrender value,' as used in the policy and note. The Penn Mutual Life Insurance Company, in common with all other standard life insurance companies, pursues the following course in regard to its policies: A level premium is charged to the insured throughout the period of the life of the policy. As the risk of death is constantly increasing, the level or average premium during the earlier years of the policy exceeds the amount of risk run by the company in any given year. During the latter years of the life of the policy the premium is less than the amount of risk in any given year. The difference between the premium charged in any one of the earlier years and the actual amount of risk run in that year is carried by the company into its 'reserve,' and thus a fund is created to meet the years when the premium is less than the risk. When a policy ceases to be in force, either by virtue of a surrender or lapse by reason of non-payment of premiums or otherwise. it may happen that under the terms of the contract the insured is entitled either to receive a cash value for his policy or to paid-up insurance of such amount as said cash value will purchase. In order to ascertain the sum which will be paid to the insured in cash, the entire reserve derived from premiums paid under the policy in question is first ascertained, and of the sum thus ascertained 75 per cent is paid to the insured. The remaining 25 per cent is retained by the company as part of its general reserve fund. The reason for retention is that, if the full reserve were to be paid in cash to each policy holder upon demand (as few, if

Digitized by Google

any, impaired risks would retire on these terms), there would be a disturbance of the average which lies at the whole business of insurance, and a consequent deficiency in the fund for the protection of the policies which remain in force. The deduction or retention of 25 per cent of the principal just stated is a reasonable retention, and is about 8 per cent less than the retention authorized by the non-forfeiture statute of the State of Kentucky. In case it is the right of the insured to receive a paid-up policy, it is the custom of the company to apply to the purchase of such paid-up insurance the full reserve, less a deduction of only 20 per cent; such deduction being found on the experience of the company to be sufficient for the protection of other policies. Where the company has made an advance to its policy holder upon the security of his policy, it may happen, in accordance with the terms of the policy as modified by the contract of loan, that the policy lapses either by reason of failure to pay the loan or by reason of the failure to pay a premium. In the event of such a lapse, it is the custom of the company to divide the reserve into two parts. One part is such a sum that 75 per cent thereof is sufficient to meet the obligation of the insured upon its note, and and the other part represents the balance of the reserve, and of said balance 80 per cent is applied to the purchase of paid-up insurance for the benefit of the policy holder. The cash surrender value is thus not less than 75 per cent of the reserve."

As a matter of fact the policy in suit in this case was issued at a time when there was no statute of this State requiring life insurance companies to allow or provide for issuing paid-up insurance upon lapsed policies. Section 659, Ky. Stat., 1894, a part of the act of 1891-93, provided: "All policies hitherto issued by any domestic life insurance company shall be sub-

Digitized by Google

ject to the provisions of law applicable and in force at the date of such issue. No policy of life or endowment insurance hereafter issued by any such company shall become forfeited or void for non-payment of premium after, in ordinary insurance two, and in industrial insurance five, full annual premiums in cash have been paid thereon; but in case of default in the payment of any subsequent premium, then, without any further stipulation or act except as herein provided, such policy shall be binding upon the company for the amount of paid-up insurance which the then net value of the policy and all dividend additions thereon, computed by the rule of section 653, less any indebtedness to the company on account of said policy, and less the surrender charge provided herein, will purchase as a net single premium for life, or endowment insurance maturing or terminating at the time and in the manner provided in the original policy contract; and such default shall not change or affect the conditions or terms of the policy, except as regards the payment of premiums and the amount payable thereon: Provided, That policies of industrial life companies shall be surrendered to the company, and application for said paid-up policy be made in writing within eight weeks after said default, on blanks obtainable from the company for that purpose. Said surrender charge shall be eight per cent of the insurance value of the policy at the date of default, which insurance value is the present value of all the normal future yearly costs of insurance which by its terms and policy is exposed to pay in case of its continuance, computed upon the rate of mortality and interest assumed in section 653. Every such policy subject to the conditions as to policies of industrial life companies as hereinbefore prescribed, after the payment of, in ordinary insurance two, and

Digitized by Google

in industrial insurance five, full annual premiums thereon, in cash, shall have a surrender value, which shall be not less than two-thirds of its net value, computed by the rule of section 653, less any indebtedness to the company on account of the said policy; and its holder may, upon any subsequent anniversary of its issue, surrender the same and claim and recover from the company such surrender value in cash. Upon the surrender, on any anniversary of its issue, of a policy which has become paid up, by force of the statute upon default in payment of premiums, after two full annual premiums have been paid, the holder shall be entitled to not less than two-thirds of its then net value, computed by the rule of section 653. On policies of industrial insurance, on which the weekly premiums are not more than fifty cents each, the surrender value in all cases shall be payable in cash. Upon the surrender, on any anniversary of its issue, of a policy which has become paid up, after the payment of five full annual premiums, by force of the statute upon default in payment of premium, the holder shall be entitled to not less than two-thirds of its net value, payable in cash. Any condition or stipulation in the policy, or elsewhere, contrary to the provisions of this section, and any waiver of such provisions by the assured shall be void."

It is suggested that the settlement in this case was had under this statute. But this is an error. For the statute is restricted in its application to policies issued subsequent to its enactment. So is the amendment of section 659, Ky. Stat. (the act of 1902), found in the edition of 1903, Carroll's Statutes. That section, as now amended, reads:

"All policies hitherto issued by any domestic life insurance company shall be subject to the provisions

Digitized by Google

of law applicable and in force at the date of such issue.

"Subdivision 2. No policy of life or endowment insurance upon the ordinary plan hereafter issued by any domestic life insurance company shall become forfeit or void, for non-payment of premiums, after three full years' premiums, in cash, have been paid thereon; but, in case of default in the payment of any premium thereafter, then, without any further stipulation or act, except as herein provided, such policy shall be binding upon the company for the amount of paid-up insurance, which, according to the company's published tables of single premiums, the net value of the policy on such anniversary, and all dividend additions thereon, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes, will purchase as a net single premium for life or endowment insurance maturing and terminating at the time and in the manner provided in the original policy; and such default shall not change or affect the condition or terms of the policy, except as regards the payment of premium and the amount payable thereon: Provided, however, That any company may contract with its policy holders to furnish, in lieu of the paid-up insurance provided for in this section, any other form of life insurance lawful in this commonwealth, of not less value.

"The reserve of such paid-up insurance shall not be less than two-thirds of the reserve of the original policy; but any outstanding indebtedness on the account of said policy shall operate to reduce the said paid-up insurance, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes.

"Every such policy after the payment of three full

Digitized by Google

years' premium thereon, in cash, shall have a surrender value, which shall not be less than seventy per cent of the reserve that would be required for the aforesaid paid-up insurance, after deducting any indebtedness as above provided, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes.

"Subdivision 3. No policy of life or endowment insurance upon the industrial plan hereafter issued by any domestic life insurance company shall become forfeit or void, by non-payment of premiums, after five full years' premiums, in cash, have been paid thereon, but in case of default on above mentioned or subsequent anniversary in the payment of any premium thereafter, then, without any further stipulation or act, except as herein provided, such policy shall be binding upon the company for the amount of paid-up insurance, which, according to the company's published table of single premiums, the net value of the policy on such anniversary, and all dividend additions thereon, computed by the rule of section 116 of the act, to which this is amendatory, and which section is section 653, Kentucky Statutes, will purchase as a net single premium for life or endowment insurance, maturing or terminating at the time and in the manner provided in the original policy; and such default shall not change or affect the conditions or terms of the policy, except as regards the payment of premiums and the amount payable thereon: Provided. That any company may contract with its policyholders to furnish, in lieu of the paid-up insurance provided for in this section, any other form of life insurance lawful in this commonwealth, of not less value. And provided, further, that on industrial policies defaulting and surrendered to the company on their fifth, or any succeeding anniversary, applica-

Digitized by Google

tion for said paid-up policy shall be made in writing within eight weeks after said default, on blanks obtainable from the company for that purpose.

"The reserve for such paid-up insurance shall not be less than two-thirds of the reserve of the original policy; but, any outstanding indebtedness on account of said policy shall operate to reduce said paid-up insurance in proportions to its ratio to the reserve for such paid-up insurance, computed by the rule of section 116 of the act, of which this is amendatory, and which section is section 653, Kentucky Statutes.

"Every such policy, subject to conditions as to paid-up surrender values, after the payment of five full years' premiums thereon, shall have a surrender value which shall not be less than seventy per cent of the reserve that would be required for the aforesaid paid-up insurance, after deducting for all indebtedness as above provided, computed by the rule of section 116 of the act, of which this is amendatory, and which section is section 653, Kentucky Statutes.

"On policies of industrial insurance, where the weekly premiums are less than fifty cents each, it shall be optional with the company issuing said policy, to pay either the cash surrender value or issue a paid-up policy of insurance, and upon such payments, the company shall be absolutely released from all further claims or demands whatsoever under or by reason of said policies, which shall then be canceled.

"The provisions of this section shall not apply to policies issued on the lives of persons under ten years of age, until five years after attaining that age.

"Subdivison 4. In construing the provisions of this act, ordinary insurance, or insurance upon the ordinary plan, shall be considered to be insurance which may be paid for by annual premiums, or by semi-annual, or quarterly, or other installments thereon at

Digitized by Google

the option of the company, and industrial insurance shall be considered as insurance purchasable solely by weekly premiums.

"Any condition or stipulation in the policy of insurance, or elsewhere, contrary to the provisions of this section, and any waiver of such provisions by the assured, shall be void."

Appellant's contention is, sharply, that it had the right, and under the statutes quoted above the same right is given, to deduct a surrender charge of not more than one-third of the reserve when a paid-up policy is issued upon a lapsed policy. To this we are unable to agree. As there was no statute on the subject in Kentucky when the policy in this case—the original contract—was issued, and as no statute of the parent State of the corporation is relied on, the contract set out in the policy is the sole measure of the parties' rights concerning paid-up insurance. It will be seen from the quoted clauses found in the original opinion that, after five full premiums had been paid, the insured was entitled to a paid-up policy for as many twentieths of the original sum insured as there were premiums paid, "provided all outstanding liability on this policy is paid off." As 12 premiums had been paid, the insured would have been entitled to twelve-twentieths of $5,000 (the original insurance), if there had been no indebtedness. The only real question then was, where should the indebtedness be credited? On the reserve, which was used in buying the paid-up insurance; or, on the amount of paid-up insurance? We held that it should be credited on the reserve as of the date of the lapse. The policy, in this provision, deals with the application of the reserve to the purchase of the paid-up insurance. The reserve is that part of all the premiums paid on the policy, which, when increased by

Digitized by Google

compound interest at 4 1-2 per cent, Actuaries' Table of Mortality, would be sufficient to pay the assured or his estate the full amount assured when the policy matures. The principle is discussed at some length in the recent opinion of U. S. Life Ins. Co. of N. Y. v. Spinks, 126 Ky. —, 96 S. W. 889, 29 Ky. Law Rep. 960. In this policy there is no provision for a surrender charge in issuing a paid-up policy under paragraph 11, quoted in the original opinion. The agreement was to apply the "full reserve" of this policy to buying for the assured either extended or paid-up insurance. The assured elected to take, and the company to issue, paid-up insurance. The "full reserve" of this policy bought of paid-up insurance, under the provisions of clause 2 of section 11, above quoted, as many twentieths of $5,000 as the number of premiums paid bore to the total number to be paid (20), after deducting from such reserve the indebtedness of the assured. As the assured had, by borrowing from his insurer a certain sum and not paying it back, already anticipated and consumed that much of his "reserve," it would be manifestly unjust to allow him to get it again by making the insurer account for it as so much money due him, in giving him paid-up insurance. Had the insured then paid back in cash the loan, he would have been entitled to a paid-up policy for such sum as his "full reserve" would have bought under the agreement in the policy. The language of the policy does not admit of any other construction. There is no suggestion in it that the company would exact or retain a surrender charge. On the contrary, the "full reserve" is to be accounted for in paid-up insurance.

But the witness Barker says that it was and is the custom with appellant company and all other standard insurance companies to deduct 25 per cent of

Digitized by Google

the reserve as a surrender charge. If such was the custom, then by the contract in this policy an exception is indicated. To apply the custom to this policy would be to take from the assured $375 which belonged to him, and apply it contrary to the contract. Appellant complains at the expression in the opinion, "This reserve which belonged in full to the insured." The reserve does belong in full to the insured, in the sense that it is the security, and in reality the only security, he had for the fulfillment by the insurer of its undertaking to him. He had contributed it in the payment of his premiums, and it is required as the very basis of all sound life insurance, and now by our statute (section 653), to be maintained and kept intact in order to make good the obligation to him. It cannot be applied to anything except his policy without impairing its security. In the statutes of some of the States it is allowed, and in the section 659 as it was originally this State recognized the right of, the insurer to deduct a surrender charge upon issuing a paid-up policy in lieu of one lapsed. But the present statute (section 659, supra) does not so provide now. and we perceive no reason for so providing. There is a reason for allowing a surrender charge in case a cash surrender is allowed. The reason is expressed in one form by Mr. Barker in his testimony quoted above. But it cannot apply to the case of issuing a paid-up policy; for then the policy holder does not withdraw anything from the company's assets. He does not "disturb the average" upon which the insurance was calculated. He stays in, and his money stays in, for the original purpose of the contract.

Nor do our statutes warrant a contrary view. In the old section, the expression, "the holder shall be entitled to not less than two-thirds of its then net

Digitized by Google

value computed by the rule of section 653," had reference to cash surrender values alone. The present section 659 also deals with "cash surrender" values, and allows a charge to be reserved in such case; but as to paid-up insurance the present statute requires the whole of the reserve of the defaulted policy to be applied to the purchase of paid-up insurance, unless the parties agree to a cash surrender in lieu thereof. Appellant construes this expression in the section of the statute, "The reserve for such paid-up insurance shall not be less than two-thirds of the reserve of the original policy," as indicating that one-third of the original reserve is not to be applied to the purchase of the paid-up insurance. This is a complete misconception of the office of that phrase. Section 653, Ky. Stats., 1903, requires all life insurance companies to maintain a certain reserve for all their policies. That reserve is such part of all the premiums paid on each of the policies in force as will, when put at compound interest at the per cent. and upon the mortality tables named in section, be sufficient to redeem each of the policies as they mature. Pursuing that course, the "reserve"—which may be likened to a redemption fund or sinking fund for the policies—can be ascertained at any date as to any policy of the respective classes issued by the company. Now section 659, Ky. Stats., requires that after certain premiums have been paid there shall not be a forfeiture of that policy's reserve because of future nonpayment of premiums, but that by virtue alone of such previous payments, and subsequent failure to pay any premium when due, the reserve—the whole of it—belonging to that policy shall be applied as a single premium in buying for the assured paid-up insurance of the same kind, and so forth. Applied how? By treating it as so much cash, and applying

Digitized by Google

it upon the company's published rate of a "single net premium for life." That expression is technical. No one nowadays ever pays a single net premium for life in buying life insurance. At least it may be safely assumed that it is extremely rare, if ever done.

We know that all premiums are based upon three items: One, and always the first, the proportion of it necessary at interest compounded, based upon the expectancy of the life insured, to pay the assured the sum insured when the policy matures; two, the proportion necessary to pay its part of death losses occuring in its class (these two are the net premiums); and, three, enough more to pay its share of expenses and incidental losses in the business. The latter is called "loading." There is no limit to the amount of loading a company may do. It all depends on whether the insured will pay it. If he does, unless that which is charged in excess of actual expenses and losses is returned to him in "dividends," he never gets any benefit from it. So, after one is already in, and his policy has lapsed for default in premium, the statute automatically converts his reserve (and "dividend additions") into a fund to buy paid-up insurance. But the sentence last herein quoted from the statute is to keep the insurer from consuming too much of the insured's reserve by loading it to death. It is therefore required that this single premium, as published, must in all events buy such insurance as that its reserve (for all sane and safe life insurance must have a reserve) shall not be less than two-thirds of the original reserve. In other words, the "single premium," alluded to in the statute, must not consume more than one-third of the defaulting policy holder's reserve for any other purpose than that of finally redeeming that identical policy. We have gone thus fully into a discussion of our statutes to show

Digitized by Google

that there is no warrant for saying that they recognize that the insurer may charge an independent arbitrary surrender charge in issuing paid-up insurance upon a defaulted policy.

Finally, the note in this case, in so far as it attempted to allow such a charge was usurious. N. Y. Life Ins. Co. v. Curry & Bro., 115 Ky., 100, 72 S. W., 736, 61 L. R. A., 268, 103 Am. St. Rep., 297. Where the original opinion uses the expression, "A true basis for the settlement is to ascertain the actual cash value of the policy at the time it lapsed," it was meant the "net value" of the policy at that date; net value being equivalent to "reserve." There is a distinction between the "net value" and the "cash surrender value" of a life insurance policy.

Petitions for rehearing and for modification of opinion are overruled.

Digitized by Google

CASE 35.—PROCEEDINGS BY BERT FORD AND OTHERS TO OBTAIN A WRIT OF PROHIBITION AGAINST JUDGE M. J. MOSS AND OTHERS.

Ford, &c. v. Moss, Judge

Application to Appellate Court for writ of prohibition—Writ denied.

1. Intoxicating Liquors—Prosecution—Jurisdiction.—Under Ky. Stats., 1903, section 1141, providing for a prosecution by information filed in a circuit court for a misdemeanor punishable by fine of not more than $100, and by imprisonment of not exceeding 50 days, the circuit court has jurisdiction by information of the offense of selling liquor on a general election day.
2. Indictment—Misdemeanor—Common-Law Offense.—An indictment is not necessary in the prosecution of a misdemeanor, which was not an indictable offense at the common law, under Const., section 12, providing that no person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia in time of war or public danger, or by leave of court for oppression, or misdemeanor in office.
3. Intoxicating Liquors—Regulations—Election Days—School Elections.—Const. section 154, requires the Legislature to enact laws to prohibit and regulate the sale of liquor on election days. Ky. Stats., 1903, section 1575, makes it a misdemeanor to sell liquor "upon the day of any general or primary election." Held, that it is a misdemeanor to sell liquor on a day when a school election is being held throughout the State.

K. D. PERKINS and H. H. TYE, attorneys for plaintiffs.

1. The indictment under which plaintiffs were tried and convicted in the Whitley Circuit Court at its November Term, 1906, was drawn under section 1575 of the Kentucky Statutes.

2. It is the contention of the plaintiffs that the facts set forth in said indictment do not constitute a public offense in this State, and moreover if such facts do constitute a public offense, then that no prosecution lies therefor by information.

Digitized by Google

3. We submit that the election which is held in each school district of this State on the first Saturday in October of each year for the purpose of electing trustees therefor, is not a general election within the meaning of those words as used in said section 1575 of the Kentucky Statutes.

4. A school election has only one element in common with a general election; namely, the selection of some person to a position of trust. It has no other element in keeping with a general election. Under the general head of elections found in Kentucky Statutes from section 1437 to 1596, no mention is made of an election for school trustees. A school election has these several peculiarities to distinguish it from a general election.

(a) Vote is taken viva voce.
(b) Election held at school house.
(c) Polls open from 1 to 6 o'clock in afternoon.
(d) Officers are one judge and a clerk.
(e) Officers are chosen by voters at opening of polls.
(f) Judge gives certificate of election.
(g) Certain widows and spinsters may vote.
(h) Ballots not furnished by public authority, or any authority. Kentucky Statutes, section 4434.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Denying writ.

Bert Ford and a number of others, who are complainants herein, were tried and severally convicted in the Whitley circuit court for selling liquor on an election day. They were proceeded against by information filed by the commonwealth's attorney in the circuit court. They have filed their petition in this court asking that a writ of prohibition issue against his honor, the judge of the Whitley circuit court, and against the clerk of the court and the sheriff of the county, to prohibit the issual and collection of executions against them upon the judgments. The application is based upon the theory that the circuit court was proceeding out of its jurisdiction, because (1) that no public offense was committed by the complainant, and (2) that the proceeding by information was not warranted by law.

Digitized by Google

It is a statutory misdemeanor to sell liquor on any general election day in Kentucky. The offense is punishable by fine of not more than $50 for each offense, Section 1141, Ky. Stats., 1903, allows a prosecution by information filed in a circuit court or before a county judge, or justice's or police court, by the commonwealth's or county attorney for a misdemeanor punishable by fine of not more than $100, and by imprisonment of not exceeding 50 days. Under this statute, the circuit court had jurisdiction by information of the offense charged. An indictment is not necessary in the prosecution of a misdemeanor which was not an indictable offense at the common law. Const., section 12; Commonwealth v. Avery, 14 Bush, 625, 29 Am. Rep., 429; Williamson v. Commonwealth, 4 B. Mon., 146; Arnold v. Commonwealth, 80 Ky., 300, 44 Am. Rep., 480.

The Constitution required the Legislature to enact laws to prohibit and regulate the sale of intoxicating liquors on election days. Section 154, Const. The statute, enacted in pursuance of this constitutional requirement, is section 1575, Ky. Stats., 1903, which makes it a misdemeanor to sell or give intoxicating liquors in any precinct, town, or county, "upon the day of any general or primary election therein." The election at which the offense charged in the information under investigation occurred was a school election held in October, 1906, at which time a general election was being held throughout the State to elect school trustees. It is claimed this was not "a general election" within the statute, and that therefore the complainant had not committed any offense.

The Constitution required the General Assembly to enact necessary laws to restrict or prevent the sale or gift of such liquors on election days. There is nothing in the section (section 154, Const.) to indicate

Digitized by Google

that the convention deemed the use of such liquors as less hurtful on one election day than another. The general purpose seems to include all election days. Sober judgment, peace, and good order, are deemed desirable and necessary for the exercise of the high duty of citizenship on all days when the electors are called upon to select their servants, or to vote upon public measures. There is no matter of more importance, or which has been shown more regard by the Constitutional Convention, or by the various General Assemblies of the State, than the interest of the people in their common schools.

Spinsters and widows vote in school elections, but in no other. A sense of propriety, if not of pardonable gallantry would seem to demand that at least as much consideration be paid these electors in assuring them a peaceful, orderly day in which to exercise their suffrage as is accorded men alone in other elections. In local option elections, primary elections, elections of municipal, county, district and State officers and members of Congress, the day is held in such esteem by the Legislature as that it has required the cessation of the sale of intoxicating liquors. There is nothing to indicate a purpose, or ground, for discriminating against the school election. They are general elections, and in our opinion are within the terms of the statute and of the contemplation of the legislation on the subject.

The writ is denied.

Digitized by Google

CASE 36.—ACTION BY EMMA GEISLER AGAINST JOHN S. GEISLER TO RECOVER A PENDENTE LITE ALLOWANCE AS ALIMONY.—January 15.

Geisler v. Geisler

Appeal from Campbell Circuit Court.

Judgment sustaining a demurrer to the petition. Affirmed.

Divorce—Alimony—Finality of Judgment—Action on Judgment.—A decree awarding to a wife certain weekly allowances as "alimony pendente lite until final order" was not a final judgment, on which an action could be maintained.

FRED B. BASSMAN for appellant.

M. R. LOCKHART for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

The common pleas court of Hamilton county, Ohio, on October 12, 1891, in the action of Emma Geisler v. John S. Geisler, entered the following decree for alimony pendente lite: "This cause came on to be heard this day upon the motion of the plaintiff for an allowance of alimony pendente lite and the evidence, and thereupon the court, with the consent of the defendant, find that said motion is well taken and do grant the same. It is therefore ordered, adjudged, and decreed by the court that the said defendant pay to said plaintiff as such alimony pendente lite, and until further order of this court, the sum of ten ($10.00) dollars per week, the first payment of said sum to be made on the 15th day of November,

Digitized by Google

A. D., 1891; further, that plaintiff shall also have, possess, and enjoy as and for such alimony the following personal property with the right to use the same at her pleasure, to-wit: All her wearing apparel, all the household and kitchen furniture of every description, now in the possession of plaintiff, situated on the premises known as 'No. 275 Breman Street,' in the city of Cincinnati, Hamilton county, Ohio. And the court, coming now to consider the motion of defendant for a dissolution of the injunction heretofore issued herein, find the same not well taken and do overrule the same. It is however, by the court ordered, adjudged, and decreed that defendant may possess and use the office furniture and books which he has heretofore used in the practice of his profession as an attorney at law, also his books of a miscellaneous character, but that he shall not sell, incumber, or otherwise dispose of same, or any part thereof, nor remove the same, or any part thereof, out of the jurisdiction of this court until further order of this court."

On January 23, 1906, Emma Geisler filed her petition in the Campbell circuit court against John S. Geisler, in which she averred that no part of the money allowed her by the above decree had been paid, and that there was now due her thereon the sum of $7,360. She also averred that the defendant owned certain property in Newport, which she prayed the court to subject to her claim. The circuit court sustained a general demurrer to her petition, and, she declining to plead further, dismissed the action. From this judgment she appeals.

The only question to be determined on the appeal is whether the decree above quoted is a final judgment, on which an action may be maintained in this State. In the case of Franck v. Franck, 107 Ky.,

Digitized by Google

362, 21 Ky. Law Rep., 1093, 54 S. W., 195, it was held that, where an allowance is to be paid in installments until changed by the further order of the court, the power of the court over the subject-matter of alimony is not exhausted by the entry of the order, but is continuing, for the purpose at any time of making such alterations as the chancellor may deem proper. The rule in England is not to compel payment beyond a year in cases of this sort, unless some explanation of the delay appears. The case of Franck v. Franck was followed in Parsons v. Parsons, 80 S. W., 1187, 26 Ky. Law Rep., 256, and Gerrein v. Mitchie, 122 Ky. 250, 91 S. W., 252, 28 Ky. Law Rep., 1193. The case at bar is not even the case of a final allowance of alimony. It is simply an order pendente lite. When the court that rendered it came to render his final judgment in the case, he had authority to disregard it entirely, and to make such judgment on the question of alimony as the proof on the whole action justified. It is not shown what judgment the court finally rendered in the action. It is not uncommon in such cases for the court, in rendering the final judgment, to take into consideration what has been paid under the pendente lite allowance, and to give a judgment for such balance as may be deemed proper under all the proof. The order of the Ohio court on its face shows that it was intended only to make a temporary provision until the case could be heard and the rights of the parties determined.

Judgment affirmed.

Digitized by Google

CASE 37.—ACTION BY THE PLANTER'S STATE BANK AGAINST W. C. SCHLAMP AND OTHERS ON A NOTE.—January 16.

Planter's State Bank v. Schlamp, &c.

Appeal from Henderson Circuit Court.

MALCOLM YEAMAN, Special Judge.

From the judgment plaintiff appeals. Affirmed.

1. Banks—Special Deposit—Appropriation to other debts of Depositor.—The rule that where one indebted to a bank has money on deposit in the bank at the date upon which a note owing to the bank by a depositor falls due, it is the duty of the bank to apply the money on deposit to the discharge of the note, and if it fails to do so it releases the sureties on the note to the extent of such deposit, applies only to general deposits and not to a special deposit.
2. Same—Discounting Note—Money left in Bank—Promise to Pay on Checks—Improper Appropriation—Schlamp discounted a note for $1,000, executed by him and two sureties at a bank in which he was not a depositor, but at the suggestion of the cashier that it was not convenient to pay him the money on that day but promised to pay it on checks when presented, and on further request for the money said he would prefer to pay on checks, and thereby delayed payment until a partnership note for $1,500, held by the bank on Schlamp and another fell due, when it notified Schlamp that it had appropriated $750 of the $1,000 note to the liquidation of his half of the $1,500 partnership indebtedness to the bank. In an action by the bank on the $1,000 note, payment was resisted by Schlamp and his sureties, to the extent of the $750. Held, That the bank had no right to appropriate the $750 or any part of the $1,000 note to the discharge of any part of the $1,500 debt owing to the bank by Schlamp, but was bound to honor his check for the $1,000 special deposit as it had agreed to do.

Digitized by Google

MONTGOMERY MERRETT for appellant.

(No brief in the record.)

CLAY & CLAY, attorneys for appellees.

QUESTIONS DISCUSSED AND AUTHORITIES CITED.

The general rule that a bank may apply general deposits to the payment of the past due indebtedness of the depositor to the bank is admitted. The note in this case was signed by the sureties under an express promise that the money was not to be used for a particular purpose; the money was placed on deposit in bank by the principal at the request of and for the convenience of the bank, with full notice and knowledge that it was to be used for some particular purpose, other than the payment of a pre-existing debt of the principal, and when the bank diverted the same from the purpose for which it was borrowed. and used the proceeds to pay a pre-existing debt of the principal to the bank, the sureties on the note were released from liability. (Russell v. Ballard, 16 B. Mon., 201; Gano v. Farmer's Bank of Kentucky, 103 Ky., 508.)

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

The appellant instituted suit in the Henderson circuit court against William C. Schlamp, Phil Schlamp, and John W. Geibel, seeking to recover from them the sum of $1,000 on a promissory note dated November 15, 1905, and due 90 days after date, with interest from maturity. Phil Schlamp and John Geibel filed their answer, set-off, and counterclaim, in which they pleaded that they were sureties merely upon the note, and that the money was borrowed for a particular purpose and was to be applied to the payment of a particular debt, and that these facts were known to the bank and its officers at the time the note was executed and discounted by said bank; that notwithstanding the knowledge of this fact, the bank had retained $750 of the $1,000 for which the note

Digitized by Google

was executed, and had applied it to the discharge of a debt due to the bank by W. C. Schlamp, upon which Phil Schlamp and John W. Geibel were not sureties and in which they had no interest, and that by reason of this act of the bank in diverting $750 from the purpose and use for which it was borrowed and intended to be applied, and for which W. C. Schlamp had agreed with them it should be applied—and but for which agreement they would not have signed the note—they were released from their liability as surety on said note; and they asked that the petition be dismissed as to $750 of the amount sued for; and if that could not be done, that the bank be required to pay to them the $750 which it had wrongfully appropriated to the discharge of another debt. Issue was joined upon the facts set up in this answer, set-off, and counter-claim, the case was tried by agreement before Hon Malcolm Yeaman, special judge, who, at the conclusion of all the testimony, instructed the jury to find for plaintiff in the sum of $250, which was done. A judgment was thereafter entered upon this verdict, and from the ruling of the trial court in peremptorily instructing the jury to find for plaintiff for $250, the bank appeals.

The facts proven are as follows: At the time of the execution of the note sued on, the plaintiff bank held a claim against W. C. Schlamp and his partner, one Andrews, for $1,500, which was about due. W. C. Schlamp was known to be in failing circumstances. He owed the bank other money, and the bank had previously called upon Andrews, and requested that he and Schlamp should strengthen the $1,500 note. W. C. Schlamp owed his brother Phil $1,000, and he requested the payment of same. W. C. Schlamp being unable to pay, agreed to borrow the money if he could, provided Phil would become his surety on

Digitized by Google

the note. To this Phil agreed, and also agreed to get their brother-in-law, John W. Geibel, to sign the note, in order to assist W. C. Schlamp, in raising the money for Phil Schlamp. In pursuance of this agreement, W. C. Schlamp called upon the Planters' State Bank, and inquired if he could get the needed money, to-wit, $1,000, if his brother Phil and John W. Geibel would sign his note as surety. Being told that he could, he took the note, went away, had it executed, signed by himself, Phil Schlamp, and John W. Geibel as sureties, and returned to the bank with it. He paid to the bank the discount in cash, and asked to be given the $1,000. The cashier informed him that this was inconvenient and not customary, and told him to give his check or checks upon the bank for this amount, and it or they would be paid. He returned to his brother Phil, and offered to give him a check, and, upon Phil's demanding of him that he get the money, he returned to the bank and again requested that the $1,000 be paid to him, and presented his check for same. He was again told by the teller, after a conference with the cashier, that it did not suit them to pay the money in cash, and that it would be much more to the liking of the bank if he would give his check for the money, and let it come in and be paid in the usual course of trade. Before returning to the bank, however, the second time, he had called the cashier up over the telephone, and had been assured by the cashier that his check would be paid when drawn for this $1,000. The proof further shows that W. C. Schlamp had done no business with that bank as a depositor for some four or five years; that he had had no deposit in that bank in his name in that length of time; that upon the occasion in question he made out no deposit slip, was given no deposit slip, passbook, or other evi-

Digitized by Google

dence of the fact that he had deposited money in the bank, but was assured no less than three times in person and once over the telephone that this $1,000 would be paid upon checks drawn by him upon the bank, if he would let them come in in the usual course of trade. The proof shows that the bank had in cash in its vaults at that time more than $20,000, and the only reason given by the cashier or teller—either at the time or at the date of the trial—for their refusal to pay this money when requested to do so, and when W. C. Schlamp presented his check accompanied by his request that they do so, was that they would be put to the inconvenience of counting out the money. Some three or four days after the discount of this $1,000 note, the $1,500 note fell due, and W. C. Schlamp was sent for and notified by the officers of the bank that they would not pay the $1,000 on his checks, as they had agreed to do and assured him they would do, but that they had appropriated $750 thereof toward the liquidation of his $1,500 partnership indebtedness to the bank. He was permitted to draw the remaining $250.

This court has frequently decided that where one indebted to a bank has money on deposit in the bank at the date upon which a note owing to the bank by the depositor falls due, it is the duty of the bank to apply the money on deposit to the discharge of the note, and if it fails to do so it releases the sureties on the note to the extent of the deposit on hand in its bank at the time of the maturity of the note. This rule, however, applies only to general deposits. It has never been held in this State to apply to a special deposit. Neither would it apply to a general deposit against which the bank, through its officers, had issued a certified check. We are of opinion that the facts in the case before us clearly show that W. C. Schlamp

Digitized by Google

did not want to become a depositor in said bank; that he was not requested to become a depositor at the time that he arranged to borrow this $1,000; the proof is clear that he wanted his money on the $1,000 note; and it was only upon the assurance of the cashier that the money would be paid upon his check when presented that he consented it should remain in the bank. Not being satisfied, evidently, with his first conversation with the cashier, he called him up over the telephone, and again notified him that he wanted his money, and was again assured that the money was there in the bank and would be applied to the discharge of such checks as he should give upon it, to the extent of $1,000; and when he later called upon the teller, he received similar assurances. These assurances and acts on the part of the officers of the bank lulled him to sleep, as it were, and induced him to consent that the bank should retain his money. Their acts amounted to an agreement on the part of the bank to pay this money any time that they should be called upon to do so by him, by check given to any one therefor. It certainly took it out of the pale of a general deposit, and to permit the bank to appropriate this money to the discharge of an indebtedness which the bank then held against W. C. Schlamp would be to permit the bank to perpetrate a fraud, not only upon W. C. Schlamp, but upon Phil Schlamp and John W. Geibel, who signed the note with the distinct understanding that Phil Schlamp was to get the money thereon. The facts proven do not warrant the conclusion that the bank knew to whom this money was to be paid, but there is not the slightest doubt but that the bank knew that the money was wanted for some particular purpose, and that particular purpose was not the payment of any part of the $1,500 indebtedness to the bank. The bank retained this

Digitized by Google

$1,000 by giving to W. C. Schlamp positive assurance, on as many as four different occasions, that the money would be paid when his checks were presented therefor. Under this promise, they secured possession of this $1,000. They contracted with him, as it were, that if he would leave the money in their bank and check it out, rather than take it in cash, they would pay it to him when he called for same, or when he gave a check to any one else calling for same. Under these facts, the bank had no right to appropriate the $750, or any part of this money, to the discharge of their $1,500 debt, or any other debt W. C. Schlamp owed to the bank, but having induced him to leave the money there under a promise that they would pay it whenever he presented, or any one else presented, his check therefor, the bank was bound to honor the check when it was presented. To have permitted the bank to retain this money after having gotten possession of it in the way it did, would have defeated the ends of justice and encouraged a species of practice not commendable.

We are of opinion that, under the facts, the instructions given by the trial court were the law of the case.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 38.—ACTION BY GEORGE FULTZ AGAINST GEORGE C. BOTTOM TO SUBJECT A LEGACY TO THE PAYMENT OF PLAINTIFF'S JUDGMENT.—January 16.

124 302
f127 245
127 250

124 302
136 335

Bottom v. Fultz

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Wills—Rights of Devisees—Election by Husband.—Ky. Stats., 1903, section 1404, providing the manner in which a widow may renounce her husband's will, does not apply to renunciation by the surviving husband of the will of his wife, but he may renounce under section 2067 providing for disclaimer by a devisee.
2. Same—Failure to Elect—Right to Compel Election.—Under Ky. Stats., 1903, section 2067, authorizing a devisee to disclaim by deed within a year after notice of probate, a husband, if he wishes to renounce the will of his wife, must follow the provisions of the statute, and his failure to do so within the time prescribed amounts to an election to take under the will, but a court cannot require him to elect.
3. Same—Construction—Husband's Life Interest—Forfeiture—Devesting Vested Interests.—A wife bequeathed all of her property to her husband in trust for her children, with full power to sell, convey, and invest as he thought best, and use the income for his support during life, provided that the property should not be incumbered by, or its rents and profits in any way subjected to, the debts of the husband, and that if any court should hold that the profits may be subjected to the debts of the husband, his interest should instantly cease, and thereafter the rents and profits should be paid to her children. Held, that the provision as to the passing of the rents and profits to the children was valid.

Digitized by Google

GEO. B. KINKEAD, attorney for appellant.

1. We insist that the right of a husband to accept or renounce the provisions of his wife's will, is a purely personal right, which he may exercise from his own volition and untrammeled by any order of court.

2. The defendant, Bottom, being the widower of his deceased wife, was vested with a certain statutory interest in her estate provided he had chosen to renounce the will and assert his right arising from the marital relation. But when he elects, as he has done, to hold under the will, he cannot be entitled to any part of her estate by operation of law and contrary to the provisions of the will.

3. It is well settled in Kentucky that such an estate as is attempted to be created by this will can be created, and that the creditors cannot reach the same, for the reason that the moment the court decrees the liability of the estate, it vanishes and passes to another.

AUTHORITIES CITED.

Bull v. Ky. Nat. Bank, 90 Ky., 452; White v. Thomas, trustee, 8 Bush, 661; Bland v. Bland, 90 Ky., 400; Brainhall v. Farris. 14 N. Y., 44; Watson v. Christian, 12 Bush, 524; Vance v. Campbell's Heirs, 1 Dana, 229; Chambers and Wife v. Davis, &c., 15 B. Mon., 522; Taylor v. Loller, 8 Ky. Law Rep., 773; Oschsver v. German Building & Savings Association, 5 Ky. Law Rep., 177; Bank of Commerce v. Chambers, 10 S. W., 38.

W. L. WORTHINGTON, attorney for appellee.

POINTS AND AUTHORITIES.

1. Trust estates of every kind are subject to the debts of the **cestui que trust.** (Ky. Stats., sec. 2355.)

2. In order to create a "Spendthrift Trust" the devisor must have an absolute right in the property, to the exclusion of the devisee. (Bull v. Ky. Nat. Bank, 90 Ky., 452; White v. Thomas, trustee, 8 Bush, 661; Bank of Commerce v. Chambers, 10 S. W., 38.)

3. In order to create a "Spendthrift Trust," all interest in and control over the trust estate by the **cestui que trust** must end on the happenings of the continuency on which it is limited. (Bland v. Bland, 90 Ky., 400.)

4. If appellant takes nothing under the will, he is entitled to curtesy in his wife's estate which is subject to appellee's debt.

Digitized by Google

5. Where an election to take under a will amounts to a fraud on the creditors of the elector, a court of equity will make an election for the benefit of creditors. (Pomeroy's Equity Jurisprudence, Third Edition, sections, 507, 509 and 510.)

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

L. D. Bottom, wife of George C. Bottom, died March 10, 1903. On March 12th her will was admitted to probate in the Fayette county court, and on March 16th George Fultz, appellee, filed his suit in the Fayette circuit court on a return of no property on a former judgment against appellant George C. Bottom, seeking to subject the interest of appellant in the estate of his wife to the payment of his judgment debts, and asking that appellant be required to elect whether he would take under the will of his wife, or take the interest given him by law in the estate of his wife, and asking for a construction of this will. Appellant demurred to the petition. His demurrer was overruled, and he declining to plead further, the court entered the following judgment: "It is adjudged by the court that defendant, Geo. C. Bottom, under the terms of the will of L. D. Bottom, deceased, took a life estate in all the property of every kind of said L. D. Bottom, deceased, with remainder over to defendants, Lillian De Bond and Firm K. Bottom, and that said estate for life so taken by defendant, Geo. C. Bottom, is subject to said defendant, Geo. C. Bottom's debts, and subject to this plaintiff's debt herein set up; that the clause in said will by which the testator, L. D. Bottom, deceased, sought to prevent said estate in the hands of defendant, Geo. C. Bottom, from becoming liable for his debts, and providing that in the event it should be held by a court of competent jurisdiction that said

Digitized by Google

estate was subject to said defendant's debts, that then, in that event, said estate should at once pass to defendants, Lillian De Bond and Firm K. Bottom, is void and of no effect whatever."

The clause of the will of L. D. Bottom which is involved in this controversy is the third clause, and is as follows:

"Third, I give and bequeath to my husband, George C. Bottom, all my estate of every character and description, to be held by him in trust for my two children, Lillian De Bond and Firm K. Bottom. My said trustee is hereby empowered to continue to conduct in my name the saloon which is now being operated in my name so long as he deems it wise and desirable to do so, but he may at any time, in the exercise of his best judgment, sell and convey the same, and reinvest the proceeds in any manner that may seem best to him. My said trustee is hereby expressly empowered to invest the proceeds of the sale of my real estate, and such money, choses in action, or other securities, as I may own at the time of my death in any manner he may think best, but the income derived from my estate, I desire to be devoted to the maintenance and support of my said husband for and during his natural life. It is my wish that my husband, Geo. C. Bottom, shall confine himself solely and exclusively to the income derived from my estate, and in no wise encroach upon the principal for his maintenance and support. It is my wish and I do direct that no part of my property shall be encumbered by, or its rents and profits be in any way subjected to, the debts of my said husband, either by process of law or by any order, assignment or contract he may make, and should it at any time be held by a court of competent jurisdiction that said

Digitized by Google

rents and profits are liable to be subjected to the debts of my said husband, Geo. C. Bottom, then, and in that event, I direct that all interest of my said husband in my estate shall instantly cease, and thereafter the rents and profits derived from my property shall be paid over to my two children, the said Lillian De Bond, and Firm K. Bottom."

Two questions are presented for consideration: First, can the appellant, at the instance of a creditor or any one else, be required to elect whether he will take under the will of his wife, or take the interest which the law would give him in the estate of his wife, and reject the will? and, second, whether that portion of clause 3 of the will, which directs that, in the event it should be held by a court of competent jurisdiction, said estate is subject to the debts of appellant, said estate shall at once pass to the children of testator, is void, and of no force and effect. Section 2132 Ky. Stats., 1903, provides: "After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she, or any one for his or her use, was seized of an estate in fee simple during the coverture, unless the right to such dower or interest shall have been barred, forfeited or relinguished; and the survivor shall have an absolute estate in one-half of the surplus personalty left by such decedent." Under this section of the statute the surviving husband or wife stands upon the same plane. Either takes an estate for life in one-third of all the real estate of which the other is seized in fee simple during the coverture, and an absolute estate in one-half of all the surplus personalty. Section 1404 provides the manner in which a widow may renounce her husband's will. This section does not apply to the surviving husband. Section 2067 pro-

Digitized by Google

vides: "A devisee may disclaim by deed, acknowledged or proved, and left for record in the clerk's office of the court in which the probate is made, within a year after notice of the probate." This section applies to all devisees who prefer to stand upon their legal rights, and are unwilling to accept the provisions of the will in lieu thereof.

This court has decided, in the case of Brand v. Brand, 60 S. W. 704, 22 Ky. Law Rep. 1366, Gillispie v. Boisseau, 64 S. W. 730, 23 Ky. Law Rep. 1046, and Smoot v. Heyser, 113 Ky. 81, 67 S. W. 21, 23 Ky. Law Rep. 2401, that a husband may renounce the will of his wife, as provided by section 2067. This is a personal privilege given to the husband, and it is one which he may exercise or not, at his pleasure; and we are of opinion that the court could not require of appellant that he exercise that right. The law provides that he may, within one year, renounce the will, and elect to take under the law. If he wishes to avail himself of his statutory right, he must follow the provisions of the statute, and his failure to do so within the time prescribed amounts to an election on his part to stand by the provisions of the will; but he has the entire year within which to act. The trial judge was evidently of opinion that appellant could not be required to elect, and, as he had not renounced the will as prescribed by law, that he was taking under it.

So we come to a consideration of the second question, which is: Was the clause which provided that in the event it should be held by a court of competent jurisdiction said estate was subject to appellant's debts said estate should at once pass to decedent's children, void, and of no force and effect? Appellant relies upon the case of Bull, etc., v. Kentucky National Bank, 90 Ky. 452, 14 S. W. 425, 12 Ky. Law Rep. 536, 12 L. R. A. 37, to uphold the validity of the clause of

Digitized by Google

the will referred to. The provisions of the will in the Bull case were very similar to the provisions in the will under consideration, and this court, in construing that will, Judge Pryor delivering the opinion, said: "That it was the purpose of the testator that his sons should use and enjoy the property devised to them unmolested by any creditor is apparent, but this affords no reason for disturbing the provisions of his will on this subject, if, by its terms, their equitable interest has passed to others. It is a mistaken idea to say that the devise gave to the sons an equitable life estate in this property, or in the rents and profits, as, by the provisions of the will under which this title is passed to the sons, they are to become divested of the title upon a certain contingency. The testator was not required to anticipate the extravagance of the beneficiaries of his bounty, so as to provide for those who might thereafter become their creditors, but, on the contrary, the property devised belonging to him, he had the right, and it was his duty, to secure the sons, and particularly their families, against such a reckless use of their property as might reduce them to want. There is nothing in such a provision as affects sound public policy, or makes this devise of the testator superior to the law of the land."

Appellee insists that the doctrine laid down in the case of Bull, etc., v. Kentucky National Bank is not applicable to the case at bar, for the reason that in the Bull case the testator was the absolute owner of the property devised in his will, whereas, in the case before us, the husband had in law an absolute estate in the property of his wife upon her death. It is true that the law gives to the husband an estate in the property of the wife at her death, but it is equally true that, under the statute, she is empowered to dispose of such property as she may own by will, and if,

Digitized by Google

in the disposition thereof, she has made provision for her husband, which is acceptable to him, he may elect, if he choose, to accept the provisions made for him in the will, and waive his statutory rights—the same as the wife may do in the property of her husband. This being true, we are of opinion that the provisions of the will under consideration, which were made for the benefit of the husband, and to afford him a support during the remainder of his life, or so long as the will should be upheld, are wise and beneficial; and being such, it should be, and is, the sound policy of the law to uphold them. This opinion is not in conflict with the case of Bland v. Bland, 90 Ky. 401, 14 S. W. 423, 12 Ky. Law Rep. 532, 9 L. R. A. 599, 29 Am. St. Rep. 390, and the difference between that case and the case of Bull, etc., v. Kentucky National Bank and this case is that, in the former case, the devisee was never divested of his interest or deprived of his title, but was given an absolute estate, and was, in every sense, a beneficiary; whereas, in this case and in the Bull case, the right of the devisee ceased instanter upon the determination by a court of competent jurisdiction that the estate was subject to the debts of the devisee.

The trial court should have sustained the demurrer to the petition, and this cause is remanded, with instructions so to do.

Digitized by Google

CASE 39.—ACTION BY MARY SELLS, ETC., AGAINST FANNIE PULLIAM BY A WRIT OF FORCIBLE DETAINER.—January 16.

Pulliam v. Sells, &c.

Appeal from Daviess Circuit Court.

T. F. BIRKHEAD, Circuit Judge.

Judgment for plaintiffs. Defendant appeals. Affirmed.

1. Landlord and Tenant—Termination—Tenancy from Month to Month.—Where a lease is from month to month, either party may terminate it by giving one month's notice.
2. Judgment—Matters Concluded.—Where the landlord in a lease by the month gave a notice terminating it, but he was defeated in a subsequent forcible entry and detainer proceeding, and subsequently he gave another notice and brought new proceedings, a plea of former acquittal was untenable.
3. Evidence—Comparison of Writings.—Ky. Stats., 1903, section 1649, provides that, on a dispute as to the genuineness of a handwriting of a person, other handwritings of such person may be introduced for comparison provided that the genuineness of such writings shall be proved, etc. Held that, where a party admits the genuineness of his signature to a writing to be compared with the disputed signature, it is not necessary to observe the requirements of the proviso.

W. SCOTT MORRISON, attorney for appellant.

Our contention is:

1. That where property is rented by the month and the landlord obtains a writ of forcible detainer against the tenant upon which a trial is had in a proper court which results in favor of the tenant, that the trial is conclusive on the landlord until it is reversed. (Civil Code, sec. 468; Hamel v. Lawrence, 1 A. K. Mar., 330; Mattox v. Helm, 5 Littell, 185; Pollard v. Otter, 4

Digitized by Google

Dana, 516; Shepherd v. Thompson, 2 Bush, 176; Marsteller, v. Marsteller, 132 Penn. State Rep., 517; Am. Stat. Reports, 604.)

2. It was proper practice for appellant to make and file her plea in bar herein, in writing, and the lower court erred in sustaining a demurrer thereto.

3. The testimony of supposed experts as to handwritings, as to the signature of appellant was incompetent. (Ky. Stats., sec. 1649; sub-secs. 1, 2, 3, 4, 5.)

LA VEGA CLEMENTS and SWEENEY, ELLIS & SWEENEY, attorneys for appellees.

1. The written contract in this case is a renting for less than a year, which under our statute could be terminated at the end of any month; thirty day's previous notice in writing having been given.

2. Under this contract, we submit that a writ of forcible detainer sued out and tried in May, 1905, would not be a bar to another writ between the same parties, sued out in September, 1905.

3. Appellant contends that the written rental contract exhibited on the trial is not her act and deed; that she never made such a contract and practically claims that her signature thereto is a forgery.

4. We submit that appellant is absolutely overwhelmed by by the proof in this case on the facts in issue.

AUTHORITIES CITED.

Shepherd v. Thompson, 2 Bush, 176; Fuller v. Mut. Life Ins. Co. of N. Y., 57 Am. State Rep., 84; Cromwell v. County of Sac, 94 U. S., 351; 96 Am. Dec., 779.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The appellees, Mary Sells and Annie Sells, being the owners in fee simple of a house and lot (called in this record a hotel) in Owensboro, Ky., leased the same to the appellant by the following contract in writing: "June 8, 1904. This contract made and agreed to by and between Mrs. Mary Sells and Annie Sells, of the first part, and Mrs. Fannie Pulliam of the second part. Witnesseth: That the first party

Digitized by Google

has, this day rented by the month their hotel building, on East Fourth street in Owensboro, Ky., to be used as a hotel, to the said Mrs. Fannie Pulliam, at a monthly rental of $20.00, due and payable during the month, and in the event of the default and failure of the said second party to pay the rent when due, she is to give quiet and peaceable possession without further notice." On the 15th day of April, 1905, the appellees, desiring to repossess themselves of their property, gave to the appellant one month's notice to vacate the premises, to-wit, on the 15th day of May, 1905. The tenant refusing to deliver possession, a writ of forcible detainer was sued out by the owners in the county court of Daviess county, where a trial was held before a jury, with the result that a verdict of not guilty was returned by them. This inquest was not traversed by the owners, but, acquiescing in the result, they abandoned all proceedings under the writ, and allowed the tenant to remain in possession of the premises. Afterwards they gave to her 30 days' notice to vacate on or before the 9th day of September 1905, and she again refused to deliver possession; whereupon a second writ of forcible detainer was sued out in the county court against the tenant, with the result that the second jury returned a verdict of not guilty. This inquest the owners traversed, and the matter coming on to be heard in the Daviess circuit court a trial was had there, with the result that the jury returned a verdict of guilty, and a judgment of restitution was entered thereon, from which this appeal is prosecuted.

When the inquest reached the circuit court, the tenant (appellant) filed a plea of former acquittal in bar of the procedure under the second writ. To this the court sustained a general demurrer, and refused, upon the trial, to permit the tenant to introduce the

Digitized by Google

record of the first inquest in bar of the second writ.

The appellant relied upon two defenses: First, as said before, the plea of former acquittal; second, that the written lease relied upon by the owners (appellees) was a forgery, in that it had been changed in a material manner, and that by the genuine contract the appellees had rented the premises to her as long as she continued to pay $20 per month, which would practically make it a perpetual lease, instead of a lease from month to month.

The question as to whether or not the writing above quoted was or not the genuine lease by which the premises were rented to appellant was properly submitted to the jury by the instructions of the court, and they found it adversely to appellant's contention. The evidence adduced upon this issue abundantly sustained the verdict, and this is all that need be said upon that question here.

The plea of former acquittal is untenable. The lease being by the month, either party could abandon it by giving one month's notice. Reccius & Bro. v. Columbia Finance & Trust Co., 120 Ky. 478, 86 S. W. 1113, 27 Ky. Law Rep. 880; Taylor on Landlord and Tenant, section 57; Wood on Landlord and Tenant, section 50. The owners were only precluded by the verdict of not guilty upon the first inquest from any further procedure under the first notice. After that they were at liberty to give a new notice for any other month to vacate the tenancy, and proceed under it, as was done here. Shepherd v. Thompson, 2 Bush. 176.

No injury accrued to appellant by the court's permitting expert witnesses to compare her signature to the lease in dispute with her admitted genuine signature to other papers and pleadings. The signatures introduced for comparison were first shown to appellant and admitted by her to be genuine. This being

Digitized by Google

first done, she has no substantial grounds to complain that the court permitted experts to compare her admitted signatures with the one in dispute, and to testify that in their opinion the signature in dispute was that of appellant. The testimony in question was introduced under the provisions of section 1649, Ky. Stat., 1903. All of the provisos attached to that section are for the purpose of protecting the party against whom the expert testimony is to be introduced from imposition by undertaking to prove the genuineness of the disputed signature by comparison with writings not fully proved to be genuine. All this is rendered unnecessary when the party admits the genuineness of the writing to be compared with the disputed signature.

Perceiving no error in the record, the judgment is affirmed.

CASE 40.—ACTION BETWEEN FELIX G. MORGAN AND OTHERS AND C. G. RENFRO INVOLVING THE LOCATION OF A TRACT OF LAND IN CONTROVERSY.—January 16.

Morgan and Others v. Renfro

Appeal from Leslie Circuit Court.

H. C. FAULKNER, Circuit Judge.

From the judgment plaintiffs appeal. Reversed.

1. Boundaries—Description—Water Courses.—The mouth of the second right-hand fork of a stream called for in a survey is a natural, indestructable monument, which will prevail over courses and distances if any must yield.

Digitized by Google

2. Same—Stake as Corner—Presumption—Performance of Official Duty—County Surveyor.—It will be presumed that the county surveyor when he designates a corner of a survey as being at a stake, actually placed one at the point indicated, in compliance with Rev. Stats., 1852, c. 102, section 3, sub-sec. 2, requiring the county surveyor in locating and surveying entries to bound them by plainly marked trees, stones, or stakes.
3. Boundaries—Description—Survey—Courses and Distances.—Where corners marking three successive lines of a survey are lost, the distances of the three lines will be altered proportionately to make them conform to the known parts of the boundary rather than to radically alter the course of one of the lines.
4. Same—Point in Known Survey.—Where a survey calls for a point in the line of a known survey, a corner of which is the nearest point in the line to the last call of the survey in question, the corner should be accepted as the point intended.

LEWIS & CALVERT, attorneys for appellants.

ROBERT L. BLAKEMAN of counsel.

CONTENTIONS—AUTHORITIES.

Where one or more corners of a survey are lost, they must be located by running the lines from the nearest known and established corners until they intersect. The point of intersection will be the corner desired.

(a) Adjudicated cases in point: (Beckley v. Bryan, et al., Sneed, 91-96; Wishart v. Cosby, 1 A. K. M., 382.)

(b) Case not in point but touching matters referred to in argument: (Pearson v. Baker, et al., 4 Dana, 321.)

(c) Case referred to but not cited for authority: (Bryan v. Beckley, Litt, Sel. Cases, 91 et seq.)

J. M. BICKNELL, attorney for appellee.

Appellee takes the following statements to be law:

1. A stake corner is mathematically known, and is not lost.
2. Unless controlled by another known corner, a stake corner is to be located by running the calls of the patent.
3. A lost corner cannot be found by reversing from an assumed stake corner.

Digitized by Google

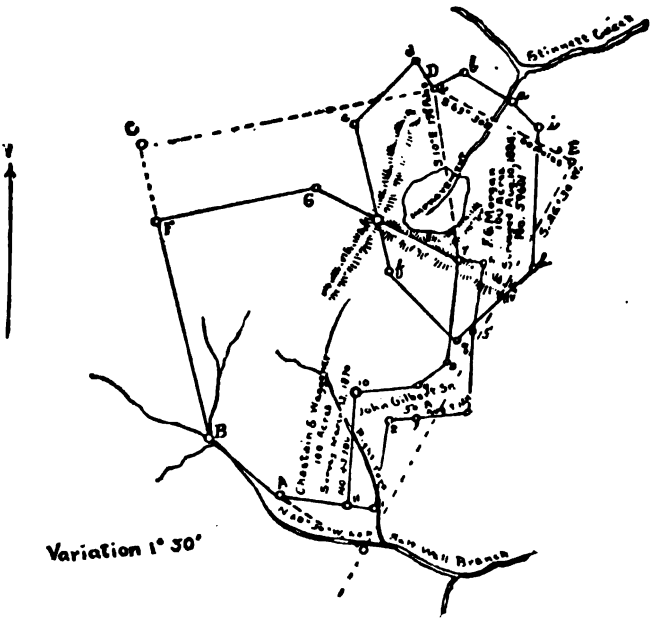
4. Every grant should be construed with as few sacrifices as possible.

5. One line of a survey is of itself of no higher dignity than any other line.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

The question for decision on this appeal is the correct location of a line of a survey of 100 acres of land made by Chastain & Waggoner in Clay county (now Leslie), March 13, 1870, on which a patent was issued to them. The controversy arises upon a conflict between this patent and one issued in 1884 to F. G. Morgan. Under the statute, the junior patent, to the extent of the conflict, is void. The question for decision is one of law, as there is no controverted fact in the case before us. To a clear understanding of the point decided, and of the contentions presented, we append a map of the two patents, and another necessary to be located. The John Gilbert, Sr., patent, dated August 9, 1831, is located because the Chastain & Waggoner patent calls for some of its lines. Furthermore, the presumption is that patentees of vacant land make their entries and surveys with reference to elder surveys which are known. The Gilbert patent is located by actual survey so far at least as is material to a correct application of the rules of construction to the patents in dispute. Both sides agree to this fact.

Digitized by Google



The F. G. Morgan patent, No. 39,601, is also located correctly. There is no material discrepancy between the surveys of it made by competent and expert surveyors for the respective parties in this litigation. The trouble arises in correctly locating the lines and corners of the Chastain & Waggoner patent. It has but two natural, visible monuments. One is its beginning corner (A on the map), which is as called for in the patent, and actually located on the ground, 2 white oaks and a double poplar, on Salt Well Branch (waters of the Middle Fork of the Kentucky river), and a small holly near a path leading up the branch, which is also a corner to a 50-acre survey made for Timothy Pennington. The first call of the Chastain & Waggoner patent is N. 52 degrees W., 80 poles, to a stake at the mouth of the second right hand fork of Salt Well Branch (B on the map). The mouth of the

Digitized by Google

second right-hand fork of Salt Well branch is a natural, indestructible monument, and must, under familiar rules, prevail over course and distance if any must yield. Running the course called for, the natural object is not reached. It required 96 poles upon that same course to reach the mouth of the branch. Thus the second corner is established. The third call is N. 15 degrees W., 300 poles, to a stake (C on the map). Fourth call is N. 75 degrees E., 300 poles, to a stake (D on the map). The fifth call, which is the crucial point in the case, is thence S. 65 degrees E., 160 poles, to a stake in the line of John Gilbert, Sr., survey. To obey the patent call here would carry the line to point E on the map, some 140 poles N. E. of the nearest point on the John Gilbert, Sr., survey. The next call in the patent (the sixth), is "thence with said line S. 25 degrees W., 600 poles, to a stake in his line;" thence N. 60 degrees W., 360 poles, to the beginning. As the sixth call is for the John Gilbert, Sr., line, the course in the Chastain & Waggoner patent will yield to the course of the Gilbert line, and will follow it, whatever its course to the nearest point, agreeable to the distance called for, that will afford a practical closing of the last line with the beginning corner. Thus we see that the controlling objects in the Chastain & Waggoner patent are (1) its beginning corner; (2) its second corner; and (3) the line of the John Gilbert, Sr., patent. That line is definitely and satisfactorily located. The problem is to reconcile all the calls and lines in the Chastain & Waggoner patent so as that none of the natural objects and known monuments may be sacrificed. To do this, it is necessary to discard some of the other calls, in part. One known corner and one established line of a patent is of as much dignity and value as any other. Appellee contends, and the circuit court decided, that the second

Digitized by Google

and third calls of the patent should be established as called for (C and D on the map), and that the fourth call must be sacrificed in both its course and distance so far as may be necessary to reach the nearest point in the nearest line of the John Gilbert, Sr., survey (D to 7 on the map). This point, from whatever construction may be adopted, is the seventh corner of the John Gilbert, Sr., patent. The circuit court, therefore, changed the course and distance in this call from S. 65 degrees E., 160 poles, to S. 10 degrees E., 178 poles; the latter course and distance bringing the line to a point, and the nearest point, in the John Gilbert, Sr., survey.

The object of definite calls and monuments in a survey made of public lands is at least twofold: One to locate to the settler or patentee the specific boundary which he acquires, the other to notify the public; those who might desire to locate vacant lands in the the vicinity for entry and survey, and those who might investigate the records to ascertain the extent of such boundaries as had been previously located and patented with the view of purchasing them. It is believed that with very insignificant exceptions there remain no vacant lands in this commonwealth, though there probably was much that was vacant, or supposed to be, in 1870, and for some years later. Nevertheless. the importance and basis of the reason for marking such original patent boundaries remains the same in other respects. There are many thousands of acres of unenclosed lands, wood land, yet in this commonwealth. Though it may all have been long since patented, there was never a time when the preservation of the original lines, and the certainty of the evidence of their location was more important. Not only is the validity of the particular patent involved therein, but as other patents which may call for their

Digitized by Google

lines, or whether they do or not, must yield to them when junior in date, the existence of the original corners is a matter of public as well as private concern. The statute required the county surveyor in locating and surveying entries, to bound them "by plainly marked trees, stones, or stakes, noting where it binds on a water course, or the marked lines of another survey, giving names." Subsection 2, section 3, c. 102, Rev. Stat., 1852. It will be presumed that the county surveyor, a public official, has performed his duty in that respect, and that when he designates a corner as being at a stake, some such object was actually placed at the point indicated. Such temporary objects, though placed as required, could not long endure, and will in short time become lost. So, for that matter, marked trees may be destroyed, and such corners be lost. In all such cases, where it comes to locate again the survey so made, the object is to reproduce if possible, or as near as may be, what was originally done in appropriating the land by the survey. If any- corner is identified from it, where the patent calls are definite as to courses and distances, it is certain that the survey may be reproduced. There are several means which may be adopted. The rule is to prefer the best evidence. Therefore marked corners—i. e., those clearly identified, and which are notorious objects—are seized upon as the most satisfactory; then natural objects not marked, such as a stream, a ridge, a cliff, or the like, for they, while not so exact, are nevertheless reasonably sure to afford satisfactory evidence of the location of the patent at or near that point; then calls for the lines of other patents, which are of record, and which are susceptible of definite and certain location; then courses; and then distances, in the order named. Nor are these all; for the object is by such circum-

Digitized by Google

stantial evidence to get at what was done before, and by rules so certain and unvarying that any subsequent inquirer, at any time, may reach the same conclusion with ordinary diligence. Hence it is allowed to consult the record of the original survey and plat, and, if there appear an error in the patent, such record may be resorted to to correct it. Steele v. Taylor, 3 A. K. Marsh. 226, 13 Am. Dec. 151; Bruce v. Taylor, 2 J. J. Marsh. 160; Harris v. Lavin, 6 Ky. Law Rep. 304; Hagins v. Whitaker, 42 S. W. 751, 19 Ky. Law Rep. 1050; Goff v. Lowe, 80 S. W. 219, 25 Ky. Law Rep. 2176. The number of acres to be embraced in the patent is also an evidence to be consulted. For, while a patent is not void, that actually contains more than it calls for, the fact that it calls for a certain number of acres, and there is a clear mistake in some of its calls, to be corrected by the evidences obtainable on the ground and in the face of the papers, the doubt may be removed in favor of a particular theory when to do so satisfies or approaches closer to the statement of the patent as to the quantity of land embraced by it. Applying these rules to the case in hand, we find that the water courses called for, and the marked timber, as well as the line of the John Gilbert, Sr., survey, are ascertained and located. The other corners, all stakes, are not found; and, by running those lines according to the calls of the patent, they cannot be located so as to close the patent boundary. They are then lost corners. In locating them under the rules laid down above, something must be sacrificed. Three lines and two corners are involved in that sacrifice. Where shall it be? We have said that one corner is not of more importance than another. Nor is one line of more importance than another. As the rule is to sacrifice distances as being the least important,

Digitized by Google

it would not do to discard any course so long as by altering distances only the survey can be made to close, leaving all identified corners intact. It was therefore, error to alter the call of the patent as to its course, as, by shortening the distances of the doubtful lines in equal proportions, all the courses would be maintained. This precise method was directed in the case of Beckley v. Bryan, (Ky.) Dec., 91, where it was said: "If the lines and corners of all surveys could be shown, the true meridian and the variations of the magnetic needle from it would be of no importance in adjusting claims to lands. Considerable aid may also be derived from the distances called for in plats and certificates of surveys, yet, when a departure from either course or distance becomes necessary, reason as well as the law seem to suggest that the distances, taken in our mode of mensuration, ought to yield, as being much the most uncertain of the two. * * * From one of the adjacent corners which remain, the courses and distances of the lost lines ought to be run, as called for in the plat and certificate of survey, and if they close with the other adjacent corner which remains, the true situations of the lost corners, and consequently the true situation of the lost lines, will be satisfactorily ascertained. But, if the courses and distances thus run do not close the survey, it must be accomplished by running the same courses, and either lengthening or shortening the distances, as each case may require, and in proportion to the length of each line, as called for in the plat and certificate of the survey. And, if the survey cannot be made to close by this means, then, and not otherwise, a deviation from the courses called for must also aid in accomplishing the purpose.

The rule of stare decisis applies with especial force

Digitized by Google

to such an opinion; for it must be presumed that within the century since it was delivered, many surveys have been made, and grants issued, and titles confirmed under its authority. It has become verily a part of the practical construction of many thousands of grants and conveyances. Furthermore, the rule is perfectly sound. Applying it, then, to the case in hand, it was the proper construction of the patent in dispute (Chastain & Waggoner) to have maintained the courses of the three lost lines, but have shortened the lines in proportion, so as to fix the lost corners at the points of their intersection. This result is attained as the nearest approximation to the patent calls which the situation affords, including quantity of land embraced. We see that the original surveyor was in error in transcribing the calls of his survey; and, as it is conclusively presumed that the error was not in the marked corners, nor in the natural objects called for, nor in the line of a previous survey of record called for, it must have been in some of the lines where there is no evidence on the ground, or in the face of the record then made, of the location. The presumption is as reasonable that it was in one line as in another, and, as it is impossible to now say in which it occurred, each is reduced proportionally till a closed boundary is effected; that being a necessary result and object of the work in the field.

Not only is the John Gilbert, Sr., survey, as located by the civil engineers who run out the disputed boundaries in this case, agreed to be the one called for in the Chastain & Waggoner patent; but as there is no evidence of any other survey by that name in that neighborhood, and particularly none that corresponds so nearly as this one with the patent calls, it is properly assumed that it is the one called for. Markham v. McGee, Hardin, 382; Marshall v. McDaniel, 12

Digitized by Google

Bush, 381. It is true that the Chastain & Waggoner patent does not call for a corner of the Gilbert survey; but a corner may be a point in a line, and, if it is the nearest point in the line to the last call of the patent designating it as an object or abutment, that may be, and should be, accepted as the point intended. From the foregoing it follows that the Chastain & Waggoner boundary is the lines A, B, F, G, 7, 8, 9, 10, 11, and that the lap of this survey upon the F. G. Morgan patent designated by the area embraced in lines Y, 7, g, and f, is the only land in dispute between these litigants. The disputed area so designated should be adjudged to appellee. The remainder of the tract in controversy claimed by appellee, being all the land northeast of the line, e, Y, 7, should be adjudged to appellants.

Judgment reversed, and cause remanded for entry of a judgment in conformity herewith.

CASE 41.—ACTION BY FRED BROWN AGAINST THE THOMAS BLACKWELL COAL & MINING CO. TO RECOVER DAMAGES FOR PERSONAL INJURIES.—January 17.

124 324
f134 833

Brown v. Thomas Blackwell Coal and Mining Company

Appeal from Webster Circuit Court.

J. W. HENSON, Circuit Judge.

From a judgment sustaining a demurrer to his petition plaintiff appeals. Affirmed.

1. **Pleading—Form of Allegation—Matters of Fact—Pleading Legal Effect.**—The allegation that plaintiff was "invited" to use the blacksmith shop of defendant is a conclusion of the

Digitized by Google

plaintiff from what passed between himself and the defendant, with reference to his right to enter or use the shop.

2. Same—Construction.—In an action for personal injuries received in defendant's blacksmith shop, it was alleged that plaintiff was "invited" by defendant to use the shop at his pleasure. It was not alleged by what particular officer or agent of defendant the alleged invitation was given, and the petition was also silent as to the language employed at the time. It was not alleged that plaintiff accepted the invitation, nor that the shop was being used by defendant on the day of plaintiff's accident, nor that the plaintiff entered the shop by defendant's invitation on that day extended; the alleged invitation, according to the petition, having been given on a previous occasion. Held, that the meaning of the petition was that plaintiff had the permission or consent of defendant to use the shop; hence, what plaintiff designated as an "invitation" was but a license.
3. Negligence—Dangerous Substances—Care Due to Licensees.—Plaintiff was a licensee with a right to use a blacksmith shop maintained for defendant's private use. Plaintiff entered the shop for the purpose of doing some work, but it did not appear that defendant or its agents had any knowledge of this. During his work a spark from the anvil fell into a keg of blasting powder, and as a result of the explosion plaintiff was injured. The powder was uncovered, and it did not appear that its presence was unknown to plaintiff or could not by the exercise on his part of ordinary care have been discovered, nor that the shop had not previously been used to store powder. There was nothing to show that its presence therein at any time was a nuisance or dangerous to the public. Held, that defendant was not liable for injuries sustained by plaintiff.
4. Same—Contributory Negligence—Licensee.—A licensee of the right to use a blacksmith shop is bound to exercise ordinary care for his own safety.

CARL HENDERSON, attorney for appellant.

BOURLAND & HUNT, attorneys for appellee.

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment sustaining a general demurrer to the appellant's petition, and dismissing the action following his refusal to amend.

Digitized by Google

After setting forth the corporate existence and powers of appellee, and that its business is that of mining and shipping coal, the petition further alleges that: "Defendant owned, controlled, and operated a blacksmith shop in connection with its mines, at or near the said mines in Webster county, Kentucky, on said date, as well as prior thereto, and since said time, which shop was used by defendant for heating, hammering, welding, and moulding iron, steel, and other hard substances, to be used about said mines; that plaintiff just prior to the said ——— day of August, 1905, had been engaged by defendant as a blacksmith to labor in said shop as such smith, but that plaintiff's contract of employment as such smith had expired a very few days before the time of the grievances hereinafter complained of, and the injury to plaintiff occurred; that after plaintiff's term of employment had expired as above stated plaintiff was invited by defendant to go into said shop and perform such labor as he might desire, and was invited to use the said shop by defendant at plaintiff's pleasure; that on the said——day of August, 1905, in accordance with said invitation, plaintiff went into said shop for the purpose of shaping a piece of iron, and after heating said piece of iron plaintiff attempted to shape same by striking it with a hammer kept in said shop for that purpose, when a spark from said iron fell into a keg of blasting powder which had been stored in said shop, and which, at the time, was uncovered, causing same to explode, together with large quantities of other powder and dynamite, all of which had been placed and allowed to remain in said shop by defendant without plaintiff's knowledge, said shop being in continuous use at said time as a blacksmith shop for the purpose for which plantiff was then using same, and many persons had

Digitized by Google

been passing in and out of said shop at all times, same being permitted by defendant; that plaintiff was as the result of said explosion violently thrown, bruised, mangled, and burned from head to foot by reason of said explosion, which was the direct result, and caused by the willful, criminal, and gross negligence of defendant in storing and placing said explosives in said shop, where defendant well knew same was dangerous to human life; that by reason of defendant's said willful, criminal, and gross negligence, plaintiff was seriously and permanently injured and damaged in the sum of $2,000. * * *"

It will be observed that the petition does not allege that the blacksmith shop was being used by appellee on the day or at the time of appellant's receiving his injuries, or that any of appellee's agents or employes were then in or about the shop. It is not averred that appellant entered the shop by appellee's invitation at the time or on that day extended. The alleged invitation to use the shop at his pleasure was, according to the statements of the petition, given appellant on some previous occasion (though the particular officer or agent of appellee by whom it was given is not named in the petition, which is also silent as to the language employed at the time), nor does the petition allege that appellant accepted the invitation. The averment that appellant was "invited" to use the shop is a conclusion of the pleader from what passed between himself and his former employer with reference to his right to enter or use the shop where he had been accustomed to work. In view of all that is said in the petition in respect to his use of the shop, and the reasonable inference deducible therefrom, we are of opinion that its fair meaning is that appellant had the permission or consent of appellee to use the shop. Therefore what the pleader designates an "invita-

Digitized by Google

tion" was in truth but a license. "The owner or occupier of real estate owes certain duties to those who come thereon according to the cause of their entry and the nature of the danger to which they are exposed. The duty to a trespasser is only against active injuries, and to a licensee it is to give notice of hidden dangers or traps; while, to invite a person, the owner is bound to use reasonable care, having respect to the person and character of the business to be carried on, to save his guest from injury while upon the premises." Jaggard on Torts, volume 2, section 258; White on Personal Injuries in Mines, section 533.

It does not appear from the averments of the petition that appellant was a licensee upon the premises under an arrangement for the mutual benefit of appellee and himself, which could have imposed upon appellee the duty of maintaining the premises in a reasonably safe condition for his use, as for an employe or guest. In view of the failure of the petition to allege the acceptance by appellant of appellee's offer of the use of the shop, or to fix any time for appellant's availing himself of the license from appellee to use it, he ought, in order to make the latter responsible for the injury claimed to have been sustained from his attempted use of the shop, at least allege that it knew or was informed of his purpose of then entering the shop. It is not so alleged, or that any agent or servant of appellee was in or near the shop on the occasion of appellant's receiving his injuries. It is apparent from the language of the petition that the blacksmith shop was not maintained by appellee for the benefit of the public, but for its own private use. It is not alleged that any work was done in it for the public. It is true that the averment is made that "many persons had been passing in and

Digitized by Google

out of said shop at all times, same being permitted by defendant," but the connection in which this statement appears creates the inference that the persons referred to were not in or about the shop when appellant was injured, and they were employes of appellee, engaged in its service from time to time in and about the shop. It does not appear from the allegations of the petition that the blacksmith shop had not previously been used as a depository for blasting powder and dynamite, or that its presence therein at any time was a nuisance, or dangerous to the public.

The petition does not allege that the explosives in question were concealed, or so situated as to make it difficult for one entering the shop to discover them. On the contrary, it admits that the blasting powder "at the time was uncovered," and by reason thereof the spark which fell in it caused the explosion. If the powder was uncovered, appellant upon entering the shop ought to have seen it. It is not alleged that he did not see it, or know the danger caused thereby, or that by the exercise of ordinary care he could not have done so. The averment of the petition that the explosives were placed in the shop by appellee without appellant's knowledge is not broad enough to exclude the inference, deducible from the admission as to the powder being uncovered and near enough to receive a spark from the anvil, that its presence was not discovered by him upon entering the shop, or that by the use of ordinary care it could not have been known to him in time to avoid the injuries he sustained.

In using appellee's shop as a licensee, appellant could not close his eyes to a patent danger, but was required to exercise ordinary care for his own safety. Therefore, if the presence of explosives in the shop made it highly dangerous for appellant's use, he cannot recover of appellee for the injuries he sustained,

Digitized by Google

unless the presence of the explosives in the shop was unknown to him, and could not, by the exercise on his part of ordinary care, have been discovered in time to prevent his injuries.

In our opinion the petition does not state a good cause of action. Therefore the demurrer was properly sustained.

Judgment affirmed.

CASE 42.—ACTION BY WILLIAM SCOMP AND OTHERS AGAINST THE LOUISVILLE & NASHVILLE RAILROAD COMPANY FOR DAMAGES FOR OBSTRUCTING THEIR PASSWAY AND CONSTRUCTING ADDITIONAL TRACKS AND STOPPING ITS TRAINS ON ITS RIGHT OF WAY THROUGH THEIR LANDS. —January 17.

124 330
1128 568

Louisville & Nashville R. R. Co. v. Scomp

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for plaintiffs. Defendant appeals. Reversed.

1. Eminent Domain—Compensation—Additional Use of Property. Where a strip through a tract of land is condemned for railroad purposes, the railroad is not liable to the landowner for damages resulting from the laying of the additional tracks on the right of way not contemplated when the right of way was secured, in the absence of negligence in the operation of the road.
2. Pleading—Conclusions—Ownership of Passway.—An allegation in the petition that the plaintiffs owned a passway across defendant's railway track is not a mere conclusion of law.
3. Same—Answer—Admissions—Failure to Deny.—An allegation

Digitized by Google

in the petition that plaintiffs owned a passway over a railroad track, not denied in the answer, must be taken as true.

4. Railroads—Operation—Obstructing Private Road.—A railroad is liable to the owner of a passway over its tracks for its obstruction only where the obstruction is negligent, and not where it is required in carrying on the business in the usual and necessary way.

5. Same—Measure of Damages.—The measure of recovery for the obstruction of a passway over a railroad by the negligent operation of the road is not the decrease in the value of the property from the obstruction, but the decrease in the value of its use within five years before the filing of the action therefor.

CHARLES R. McDOWELL, attorney for appellant.

EDWARD W. HINES, CHENAULT HUGUELY, BENJAMIN D. WARFIELD, of counsel.

The whole question presented in this record is one of an attempt to be paid the second time for the natural and probable consequences estimated and covered by consequential damages in the original finding, and the price paid, to-wit: fifteen hundred dollars, where lands of little or no value were taken, is strongly persuasive of the fact that all of these matters were considered, in fact by the jury in 1864. If the court should hold otherwise, the meaning of such rule would be to allow any property owner originally paid for a right-of-way and the consequential injury, inconvenience and damage resulting therefrom, to again come into court when the traffic of the railroad increases, and again compel the railroad company to respond in damages for that for which compensation has already been made and received.

AUTHORITIES CITED.

Clark v. Hart, 98 Ky., 33; Roulston, &c., v. C. & O. Ry., 21 Ky. Law Rep., 1507; Thompson v. L. & N. R. R. Co., 23 Ky. Law Rep., 476; Illinios Cent. R. R. Co. v. Hodge, 21 Ky. Law Rep., 1479; Railroad Company v. Orr, 91 Ky., 111; White v. Chicago R. R. Co., 23 N. E., 782; 2 Wood Railway Law, pages 897, 898, sec. 256; Cummins v. Des Moines, &c., R. R. Co., 19 N. W., 270; Elliott on Railroads, sec. 1004; Miller v. Green Bay Railroad Co., 26 L R. A., 443.

JOHN W. RAWLINGS, attorney for appellees.

Digitized by Google

ROBERT HARDING, E. V. PURYEAR, JOHN C. VORIS, of counsel.

Appellees contend that the court erred in not allowing them to introduce proof and make an issue with the appellant on the question as to whether or not the appellant did, as alleged in the petition throw burning cinders or fire and soot and cause smoke to fall and be carried and thrown upon and into appellee's dwellings and buildings, injuring the appearance of same, etc.

Appellees contend that these matters were elements of damage that should have been, under proper instructions, submitted to the jury. It is true that in 1865 the land whereon this appellant has run its railroad and built its additional side tracks, and where this private passway, owned by appellee is, was condemned for railroad purposes, and consequential damages allowed appellees under the circumstances and proof introduced before the jury at that time. Appellees contend that although appellant had a right to use its railroad and run its cars thereon, that it had no right to throw burning cinders and soot and to make loud noises and disturb appellees in the enjoyment of their home and premises without paying damages therefor. Under the Constitution of the State of Kentucky, section 242, this railroad would have a right, and did, at the time it did condemn this land, have the right to do so, but at the same time it would have to pay for the property, and then use the property in a reasonable manner.

AUTHORITIES CITED.

Clark v. Hart, 98 Ky., page 33; McDaniel v. Stums Adm'r, 23 Ky. Law Rep., 1935-38; 1st Southerland on Damages, sections 15, 16, 17 and 28; Hudson and wife v. L. & N. R. R. Co., 14 Bush, 303; L. & N. R. R. Co. v. Walton, 24 Ky. Law Rep., 9 and 10; Bramlette v. L. & N. R. R. Co., 23 Ky. Law Rep., 181; Richmond and Lancaster Turnpike Road Co. v. Madison County Fiscal Court, 24 Ky. Law Rep., 1260; 3d Southerland on Damages, vol. 4, 3d Edition, sec. 1062; City of Louisville v. Seibert, 21 Ky. Law Rep., 329; Elizabethtown, Lexington & Big Sandy Ry. Co. v. Combs, 10 Bush, 282; J. M. & I. R. R. Co. v. Esterle, 13 Bush, 677; Camden Interstate Ry. Co. v. Smiley, 27 Ky. Law Rep., 134; City of Henderson v. McClain, 19 Ky. Law Rep., 1452; Koch, &c., v. Kentucky and Indiana R. R. and Bridge Co., 26 Ky. Law Rep., 215.

Digitized by Google

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

William Scomp owned a tract of land in Boyle county through which the Knoxville Branch of the Louisville & Nashville Railroad was located in the year 1865. Being unable to agree with Scomp, the railroad company filed in the the Boyle county court a proceeding to condemn the right of way through his land 66 feet wide containing 2.54 acres. Scomp was not satisfied with the judgment in the county court, and appealed to the circuit court, where he obtained a judgment for $125 for the land taken and $1,375 for the consequential damages, making in all $1,500. The railroad company then took possession of the right of way and built the railroad upon it. For many years after the railroad was built there was no station near Scomp's place. The trains passed through without stopping. About the year 1899 the railroad company, the better to carry on its business, put in a number of tracks and established a station at Scomp's place. This was due to these facts: A heavy freight business was done over the road, and one engine could pull from this point to Louisville 1 1-2 times as much as it could pull from the Tennessee line to this point. So the company made this a point for breaking up trains, and the additional tracks referred to were established for that purpose. Scomp's house and stable stood very near to the railroad, and the pike which he traveled was on the opposite side of the railroad from his house. For many years he has used a passway across the railroad in front of his house over to the pike. The establishment of the additional tracks, the stopping of the trains, and the making up of trains at this point interferred

Digitized by Google

very much with the use of the passway, and this action was filed in September, 1903, to recover damages.

In the first paragraph of the petition it was charged that within five years the defendant had built the additional tracks not considered or contemplated when the right of way was secured, and was continually moving cars upon them in close proximity to the plaintiff's residence, thereby causing loud noises, throwing soot, smoke, and cinders upon the premises, jarring them, and greatly damaging them as a habitation. For this damages were prayed in the sum of $5,000. In the second paragraph it was averred that the plaintiff owned the passway referred to, that it afforded the means of ingress and egress to and from the premises, and that since the additional tracks had been built the defendant was continually storing and putting in and taking out cars on these tracks in front of the house over the passway, running and switching cars across it in great numbers continually, thereby obstructing the passway and making it dangerous to pass over it. For this damages were prayed in the sum of $1,000. The court overruled the defendant's demurrer to each paragraph of the petition, but when the evidence came to be heard he ruled that there could be no recovery under the first paragraph and gave the jury this instruction as the law of the case: "If you believe from the evidence that prior to the institution of this action, August 31, 1903, and within five years prior thereto, the defendant built a side track and a Y near to and in close proximity to plaintiff's residence and lands for storing cars thereon and switching purposes, and in the operation of same by defendant the passway of the plaintiffs has been obstructed, so as to prevent the reasonable use of same for purposes of ingress

Digitized by Google

and egress to and from their lands, and because thereof the said lands have been depreciated in value, then you should find for plaintiffs such sum as you believe from the evidence will reasonably compensate them for such depreciation in the value of said lands, if any, because of such obstruction of said passway, not to exceed, however, the sum of $1,000; and if you do not so believe you should find for defendant." The jury found for the plaintiffs in the sum of $1,000, on which the court entered judgment, and the defendant appeals.

The court should have sustained the defendant's demurrer to the first paragraph of the petition, and no evidence relating to these matters should have been admitted before the jury. When the defendant condemned the right of way and took title to the strip of land condemned for the railway, it acquired the right to use it, not only for the one track which it originally built, but for such additional tracks as from time to time it may find it necessary to build or deem useful in its business. It has the right to devote the entire strip to its purposes as provided in the judgment of the court, and all damages from the use of this strip for railway purposes are included in the original assessment. The plaintiffs cannot now complain that more tracks have been laid on the land than were contemplated at that time, or that trains, instead of running by as they formerly did, are now stopped and broken up. The defendant must serve the public. It has the right to make stations on its own land as the exigencies of the public service may require, and to stop and break up its trains at any station it sees proper. When land is condemned for rallway purposes, the strip is taken, not with reference alone to the present needs of the company, but for all needs which the future may develop. The plaintiff's have,

Digitized by Google

therefore, no cause of complaint that the defendant built the additional tracks referred to, or broke up its trains, or stored its cars on these tracks. There is no allegation in the petition that any of the acts of the defendant were negligently done or were unnecessary in the careful and proper operation of trains. The defendant has the right to operate its road on the strip; but it must do this in the usual and proper way, and it is liable to the plaintiffs for any damages they may sustain by the negligent and improper operation of the railway. But as the record is now presented there is neither allegation nor proof to sustain a recovery upon this ground. L. & N. R. R. Co. v. Orr, 91 Ky. 111, 12 Ky. Law Rep. 756, 15 S. W. 8; I. C. R. R. Co. v. Hodge, 55 S. W. 688, 21 Ky. Law Rep. 1479; 2 Lewis on Eminent Domain, section 565.

As to the second paragraph of the petition, the averment that the plaintiffs owned the passway is not a statement of a mere conclusion of law. The allegation that the plaintiff is the owner of certain property was a sufficient allegation at common law, and it is good under the Code. In the case of Clark v. Hart, 98 Ky. 33, 17 Ky. Law Rep. 604, 32 S. W. 216, it was averred in the petition simply that the plaintiffs had a right to go over the passway. The petition there showed that the plaintiffs did not own the passway, and it did not show any facts giving them a right to use it. The allegation here is that the plaintiffs own the passway, and this is sufficient. The proof does not show how the plaintiffs became entitled to the passway. It does not seem to have been referred to in the condemnation proceedings. The allegation in the petition that the plaintiffs owned the passway is not denied in the answer, and therefore must be taken as true on the appeal. From the facts shown it would seem prob-

Digitized by Google

able that the plaintiffs had a road out to the pike where the passway now is when the railroad was built, and that they have continued to use it since that time. No evidence was introduced on the trial on the subject of the title to the passway, as no issue had been formed on it; and as to what the rights of the parties are in the matter we express no opinion, as the facts are not before us.

Ordinarily a private crossing over a railroad is subject to the use of the railroad by the trains. The persons using the passway must keep out of the way of the trains, and they can only use the passway when the track is not occupied by the trains. The railroad has the right to use its track or tracks in the ordinary conduct of its business, and the persons claiming the passway cannot complain that the business of the railroad company is carried on in the usual way or as necessity may require. The railroad company may not negligently obstruct the passway, or needlessly do so; but it may increase its trains as its business may require, and it may lay additional tracks, and use these tracks with its trains as its business may require. The instruction which the court gave should have omitted all reference to the additional tracks laid by the defendant, and should only have allowed a recovery for such obstruction of the passway as was not due to the prudent and proper operation of the railway. If the passway was simply used by the plaintiffs by acquiescence on the part of the railroad company, and was not held as a legal right, then the railroad company had a right to run its trains as it pleased, and stop them when it pleased, and the plaintiff cannot complain. But, if the passway was held as a legal right, then the railroad company can not obstruct it negligently with its trains. It could

Digitized by Google

only use the passway with its trains in the usual course of business, conducted with proper care. To illustrate: If the defendant, in consideration of the plaintiffs' granting it elsewhere a strip of ground, had granted the plaintiffs this passway, it would not be allowed to violate its deed, made for a valuable consideration. It could not fence up the passway, and it cannot do by indirection what it could not do directly. But the measure of damages for this is not the decrease in the value of the property from the obstruction of the passway by the building of the side tracks and the use of them by the cars. The proof shows that the turnpike crosses the railroad and may be reached on the plaintiff's own land at a distance of 200 feet from the passway. Although the railway may have negligently obstructed the passway at different times in the past, it may not negligently obstruct it in the future. The obstruction of the passway by standing cars across it is not a continuous thing. The proof shows that trains sometimes stand across the passway some minutes. On one occasion a train obstructed it for an hour, and on another occasion for half an hour. Still such obstructions may not occur again, and only damages for what has been done negligently can be recovered. The measure of recovery, if the passway is held as a legal right, is the diminution, if any, in the value of the use of the property within five years before the filing of the suit, by the obstruction of the passway from trains standing upon it an unreasonable time by reason of the negligent operation of the road. And in determining this the jury should consider the practicability of another outlet to the pike over the plantiffs' own land. See L. & N. R. R. Co. v. Carter, 86 S. W. 685, 27 Ky. Law Rep. 748.

The rule allowing a recovery of damages where

Digitized by Google

ingress and egress to and from the property has been obstructed by a railway built in a street under municipal authority has no application where, as here, the right of way over private property was condemned and the damages assessed for the land have been paid. The cases relied on for appellees are, therefore, not applicable. In Bramlette v. L. & N. R. R. Co. 112 Ky. 300, 68 S. W. 145, 24 Ky. Law Rep. 181, Bramlette's property had not been condemned under the power of eminent domain. The same is true of L. & N. R. R. Co. v. Walton, 67 S. W. 988, 24 Ky. Law Rep. 9. Where the land has been condemned and the damages paid, ingress and egress to and from the property are matters conclusively presumed to have been considered in the assessment of the damages in the condemnation suit.

There is no allegation in the second paragraph of the petition of negligence in the operation of the trains, and the defendant's demurrer to this paragraph, also, should have been sustained. On the return of the case the circuit court will allow the plaintiffs to amend their petition, and will also allow the defendant to amend its answer.

Judgment reversed, and cause remanded for a new trial.

Digitized by Google

CASE 43.—PROCEEDINGS BY THE COMMONWEALTH TO RESTRAIN WILLIAM M. CARNES FROM ACTING AS SPECIAL JUDGE IN THE CASE OF COMMONWEALTH AGAINST HARGIS AND OTHERS IN THE BREATHITT CIRCUIT COURT.—January 18.

Commonwealth v. Carnes

On motion before the Court of Appeals. Motion overruled.

1. Special Judges—Duties and Powers.— It is not necessary that a special judge shall be a resident of the district in which he presides.
2. Qualifications—The present statute provides that a special judge must possess "all the qualifications of a circuit judge to try such action, proceeding or prosecution," but a statute requiring that a special judge must possess "the qualifications of a circuit judge" means that he must possess all the qualifications of a circuit judge.
3. Special Terms.—A special judge may call and hold a special term just as a regular judge could hold it.
4. Granting Continuances.—The special judge having the same power as the regular judge must necessarily exercise a sound discretion in the matter of granting continuances. It is proper that due regard should be given to the views of the attorney for the commonwealth, but the judge has a discretion which he must exercise.
5. Indictments—Accessories Before the Fact.—Under an indictment for murder one may be convicted as an accessory before the fact although not present at the time of the killing.
6. Appointing Elisor.—Under the facts shown, the special judge did not abuse a sound discretion in deciding to appoint an elisor to act in lieu of the sheriff.
7. Trying Cases as Docketed.—The judge has the right to try the cases as they stand on the docket.
8. Selecting Jury—Drawing from Wheel—Bystanders.—In selecting a jury, if the special judge has not the key to the jury wheel he should apply to the regular judge for it, and when the regular panel of the jury is exhausted he should draw jurors from the wheel and not summon bystanders, and if,

Digitized by Google

after a reasonable effort, a jury cannot be obtained in the county where the trial is had, he may direct a jury to be summoned from an adjoining county.

N. B. HAYS, Attorney General, J. P. ADAMS, BYRD & JOUETT and C. H. MORRIS, for plaintiff.

LEWIS McQUOWN, J. H. HAZELRIGG, McQUOWN & BROWN, and HAZELRIGG, CHENAULT & HAZELRIGG, for defendant.

OPINION OF THE COURT BY JUDGE HOBSON—Overruling motion.

The regular circuit judge declined to sit in the case of Commonwealth v. James Hargis, and several other prosecutions pending in the Breathitt circuit court. The Governor appointed William M. Carnes as special judge to hold the court. He called a special term of the court for the trial of the cases, and was proceeding with the trial of the case of Commonwealth v. Hargis, when the Attorney General and the commonwealth's attorney filed in this court a petition praying this court to issue a writ, restraining him from further proceeding in the matter. A temporary order was made as prayed; a response was then filed to the petition, and the case was heard orally. We will indicate briefly our conclusions upon the record.

1. It is not necessary that a special Judge shall be a resident of the district. It was so held in Farrell v. Commonwealth, 7 Ky. Law Rep. 683, and in Breckinridge v. Commonwealth, 97 Ky. 267, 17 Ky. Law Rep. 263, 30 S. W. 634. The statute under which these decisions were rendered, provided that the special judge must possess "the qualifications of a circuit judge." The present statute provides that he must possess "all the qualification of a circuit judge to try such action, proceeding, or prosecution." The require-

Digitized by Google

ment that the special judge must have the qualifications of a circuit judge would not be satisfied, if he possessed only part of the qualifications, and did not possess others. The addition of the word "all" in no way changed the sense. It simply expressed in words what was clearly meant before. Judge Carnes possessed all the qualifications of a circuit judge to try the prosecution, and was competent to sit.

2. It was not necessary that the regular judge of the district should call the special term. He had declined to sit in the cases at all. The special judge, by section 971, Ky. Stat., 1903, is given all the power of the regular judge. He is simply substituted for the regular judge in the cases referred to, and may call and hold a special term, just as a regular judge could hold it. The act of 1906 (see Acts 1906, p. 249, c. 23) is an amendment to section 964, Ky. Stat., 1903, and does not repeal the provisions of section 971. The special judge, after he qualified, possessed all the powers of the regular judge as to the cases for which he had been appointed. We therefore conclude that the court was properly constituted, and that the special term was regularly called.

3. The action of the circuit judge in overruling the motion of the commonwealth for a continuance was evidently based upon the ground that the attendance of the witnesses could probably be secured, and his judgment in this matter seems to have been verified by the facts. The circuit judge must necessarily exercise a sound discretion in the matter of continuances. The defendant is entitled to a speedy trial, and the circuit judge should not allow the case to be continued over his objection, unless, in the judgment of the circuit court, the ends of justice so require. It is proper that due regard should be given the views of the commonwealth attorney as the representative

Digitized by Google

of the commonwealth, but, after all, the circuit judge has a discretion in the matter, which he must exercise, and we see nothing in this record to indicate an abuse of discretion in the court's overruling the motion for a continuance.

4. The motion of the commonwealth attorney to quash the indictment and re-refer the case to the grand jury was made apparently on the ground that the circuit court, in a neighboring circuit, had held, under a similar indictment, that the defendant could only be convicted as principal in the homicide. The commonwealth attorney learned that much of the evidence for the commonwealth would be directed to show that the defendant was an accessory before the fact, and, being apprehensive that the ruling referred to would be followed in this case, he moved the court to quash the indictment, and re-refer the case to the grand jury. The court took the view that the indictment was sufficient, and that there was nothing to be gained by quashing it and re-referring the case to the grand jury. In the case of Commonwealth v. Hargis (this day decided), 99 S. W. —, this court has reversed the case referred to in which the indictment was held insufficient to warrant the conviction of the defendant as an accessory before the fact. Judge Carnes was right in holding the indictment good, and a reference to the grand jury unnecessary. Under the indictment the defendant may be convicted, if he was absent at the time the homicide was committed, and was an accessory before the fact to the murder.

5. Under the facts shown, the circuit court did not abuse a sound discretion in deciding to appoint an elisor to act in lieu of the sheriff. There was no controversy as to the facts stated in the affidavits.

6. The court had the right to try the cases as they stood on the docket.

Digitized by Google

7. By section 2244, Ky. Stat., 1903, it is provided that if, at any special term of a circuit court, grand or petit juries are required, the judge of the court may direct the clerk to open the list made and delivered to him at the last regular term, and that the clerk shall then open the list, and deliver a copy to the sheriff who shall summon the jurors. It is also provided that the judge shall draw from the wheel other lists for the next regular term of the court, instead of the lists used. As the special judge has all the power of a regular judge, this section applies to the special judge no less than the regular judge. If the special judge has not the key, he should apply to the regular judge for it, as it is provided in section 2245, Ky. Stat., 1903, that the regular judge shall transmit the key by some reliable person or by express to the pro tem. judge of the court at any term of the court at which a jury is to be drawn, if the regular judge cannot attend. The circuit judge, in the case at bar, should make up the panel as indicated, and should not summon bystanders. It is provided in the Acts of 1906 (See Acts, 1906, p. 532, c. 156), as follows: "If, in any criminal or penal cause or proceeding called for trial, the panel shall be exhausted by challenge, the judge may supply such jurors by drawing from the drum or wheel case, or he may direct the sheriff to summon for the trial of that cause any number of bystanders or persons to fill such vacancies." In this case, in view of the facts shown by the record, if the panel should be exhausted before a jury is made up, the judge should supply the jurors by drawing from the drum or wheel, and if, after a reasonable effort in this way, a jury cannot be obtained in Breathitt county, the court may, under section 194 of the Criminal Code of Practice, direct a jury to be summoned from an adjoining county. No

Digitized by Google

motion has been made by either party for a change of venue.

In the foregoing conclusions all the members of the court concur. In view of the fact that we are assured by Judge Carnes that it will be his pleasure to execute the law as declared by this court, and inasmuch as the statute as to the selection of jurors with its amendments has not been heretofore construed, the court is of opinion that the preliminary order heretofore staying proceedings should be set aside, and the petition dismissed. This conclusion renders it unnecessary for us to pass on the jurisdiction of this court in the premises.

Motion overruled.

CASE 44.—ACTION BY T. GRANT SLAUGHTER AGAINST W. H. GREGORY FOR PERSONAL INJURIES BY AN AUTOMOBILE.—January 18.

Gregory v. Slaughter

124 345
f133 390

Appeal from Jefferson Circuit Court, C. P. Branch (Second Division).

THOMAS R. GORDON, Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Municipal Corporations—Streets—Use as Highway—Automobile Accident—Injuries to Pedestrian.—Plaintiff was struck by defendant's automobile as plaintiff was following a street car which was about to stop on the opposite side of a street to permit him to board it. Defendant was driving his automobile at from eight to ten miles an hour on one of the principal thoroughfares of the city. He was unable to see

Digitized by Google

the crossing as he approached it because the street car was between him and the crossing, and, instead of stopping his automobile until the car passed, he merely changed his direction, so as to go around the passing car, when he was brought face to face with plaintiff at a distance too short to prevent a collision. Held, that defendant was grossly negligent, rendering him liable for plaintiff's injuries.

2. Damages—Verdict—Excessiveness.—Plaintiff, who was struck by an automobile had his hand badly cut and one of his fingers broken and was severely bruised. He was confined to his home for several weeks, and his hand was permanently injured. Held, that a verdict of $2,500 was not excessive.
3. Same—Loss of Time.—In an action for personal injuries to an insurance solicitor, the fact that plaintiff's remuneration in his business was contingent, and depended on the number of risks he succeeded in writing during the year, did not preclude an allowance for loss of time because of his injuries, to be determined on a basis of his average earnings.

HELM, BRUCE & HELM for appellant.

Appellant, Mr. W. H. Gregory, is a victim of the prejudice against automobiles. That such a prejudice exists we suppose will hardly be disputed. It was certainly shown in the case at bar.

If this injury had occurred in this way and with these results by reason of a man being struck by an ordinary wagon or buggy, we think we can say without any doubt that, considering the character of the injuries and all the circumstances, no jury would have given the plaintiff over $200 or $300. Possibly some jury might have been worked up to $500. The jury in the case at bar rendered a verdict against Mr. Gregory, by reason of his being in an automobile, in the sum of $2,500.

We submit that this verdict was grossly excessive, and was manifestly given under the influence of passion and prejudice against automobiles.

Furthermore we submit that the court erred in allowing the plaintiff to testify that the loss of his business by reason of his injuries was $1,000, which, he said in effect, was the amount of commissions he believed he would have earned, and which he did not earn by reason of his injuries. This testimony was objected to, and a motion made to exclude it, but the court let the testimony in.

Digitized by Google

AUTHORITIES CITED.

1. Excessive damages. (L. & N. R. R. Co. v. Law, 14 Ky. Law Rep., 850; N. N. & M. V. Co. v. Walker, 14 Ky. Law Rep., 175; Louisville Railway Co. v. O'Mara, 25 Ky. Law Rep., 819.)

2. Loss of Profits. (L. & N. R. R. Co. v. Hall, 24 Ky. Law Rep., 2487, 2492; L. & N. R. R. Co. v. Logsdon, 24 Ky. Law Rep., 1566; Howe Machine Co. v. Bryson, 44 Iowa, 159; Pollock & Co. v. Gantt, 69 Ala., 377; Lewis v. Atlas Mutual Life Ins. Co., 61 Mo., 534; Cincinnati Gas. Co. v. Western Siemens Co., 152 U. S., 200; Hair v. Barnes, 26 Ill. App., 583; Stern v. Risenheim, 67 Md., 507; Washburn v. Hubbard, 6 Lansing, 11; Smith v. Gentry, 20 Ky. Law Rep., 171; Hahn v. Horstman, 12 Bush, 257; Epenbaugh v. Gooch, 15 Ky. Law Rep., 576; Carsey v. Farmer, 25 Ky. Law Rep., 1965; Smith v. Western Union, 83 Ky., 118.

CHAS. H. SHEILD, attorney for appellee.

1. It is contended that the verdict is excessive. The only evidence as to the amount of the injury sustained by Mr. Slaughter is the fact that he has paid doctors' bills to the extent of $60.00, that he has had clothes ruined to the extent of $30.00, that he has lost in his business $1,000.00, that he has suffered intense physical agony for over six months, was confined to his bed and to his house for several weeks in utter pain and suffering, and that he has left, as a permanent memorial of this accident, a right hand so torn, mangled and distorted, that one finger stands permanently stiff and immovable and the tendons so distorted and torn and misplaced that the balance of his hand can only be half closed, the physical power of the hand gone and gone forever, utterly useless for any manual labor, even for the lifting of the ordinary burdens that a gentleman would be called upon to lift; with free use only of two fingers and a thumb, enabling him still to write, but useless practically in all other respects.

2. The earnings of Mr. Slaughter are from his personal labor and skill. It is not profits out of the business nor speculative profits for a breach of contract, but which, as he says, judging by his past experience of his earnings from his personal labor by reason of this injury he lost "the value of his time," and the "value of the time lost" is fixed by the Kentucky authorities as one of the elements of his damage, and therefore evidence as to the value of that lost time, was admissible and competent.

Digitized by Google

OPINION OF THE COURT BY JUDGE BARKER—Affirming..

The automobile which W. H. Gregory was driving through the streets of Louisville collided with T. Grant Slaughter, at the corner of Broadway and Brook streets, inflicting upon him painful and permanent physical injuries, to recover damages for which this action was instituted, with the result that the jury returned a verdict in favor of plaintiff for the sum of $2,500. The defendant's motion for a new trial being overruled, he is here on appeal.

The substantial facts are these: Broadway street, at the place of the accident, runs east and west. Brook street, at the same point, runs north and south. T. Grant Slaughter, just before the accident, was at the northeast corner of Brook and Broadway streets, and desired to board a street car which was running on Brook street, going south. A regulation of the street car company forbids the stopping of its cars within the intersection of streets. The car in question, therefore, could only stop to receive and discharge passengers after it crossed to the south side of Broadway. Slaughter, in order to catch the car when it stopped, ran across Broadway, probably keeping up with the car, which was moving slowly. At this time the appellant, Gregory, was driving his automobile along the south side of Broadway, going east. He did not see Slaughter, nor could Slaughter see the automobile coming, because the street car was between them. The rate of speed at which the automobile was being driven is disputed. The witnesses for the plaintiff (appellee) describe it as going at a terrific rate of speed; the appellant, who claims to be an experienced automobilist, states he was travel-

Digitized by Google

ing at the rate of from eight to ten miles an hour. It is not seriously disputed that the automobile came up so close to the street car as to create the impression that there was danger of a collision between the two; but, before this could take place, by the use of the steering lever, appellant veered his automobile around the car, where he found Slaughter directly in his path, and within six feet of him. He claims (and it may be conceded to be true) that after he saw appellee he could not, by any sort of diligence, stop his automobile in time to prevent the collision and the infliction upon appellee of the injury complained of.

A careful reading of the evidence in this case convinces us that the appellant was driving his car at a high rate of speed, although, as we see it, appellant's own estimate of the rate may be accepted as true. His automobile weighed 2,300 pounds. He states it was going at the rate of eight to ten miles an hour. He was on one of the principal thoroughfares of a great city, and approaching a crossing where it was at least reasonable to expect pedestrians to be. He could not see this crossing for the reason that the street car was between him and it, and thus obscured his vision. Instead of stopping his automobile until the car passed and he could see whether there were pedestrians on the crossing beyond, he simply changed his direction so as to go around the passing car, and by his own act was brought face to face with the appellee at a distance too short to prevent the collision at the rate he was moving. This was, in itself, gross negligence to the verge of recklessness. In practical result there was no difference between what he did and if he had shut his eyes and driven his automobile over the street crossing without observing whether any one was in his way or not. So we conclude that, accepting appellant's own evidence as a

Digitized by Google

correct statement of the facts, he was guilty of gross negligence in inflicting the injury which occurred to appellee.

It is urgently insisted, as a cause for reversal, that the verdict is excessive. The evidence as to the injury received by appellee shows that he was knocked down and dragged, partly clinging to the car and partly under it, for a distance of 10 or 15 feet. His hand was badly cut, one of his fingers broken, and he was severely bruised on various parts of his body, especially upon one of his legs. He was confined to his home several weeks. His hand is permanently injured; it being so stiff that he cannot close it entirely, although he can still write with it. Appellee's injury is far greater than the mere breaking, or the loss, of a finger. The whole hand is permanently injured, although the loss of its use is only partial. The cases relied on by appellant as showing that the verdict in this case is excessive did not involve the permanent injury to the whole hand, but were confined to the loss of one finger, or the mere breaking of a finger; nor was there any other injury inflicted. Taking all the facts of this case into consideration—the pain, both mental and physical, which appellee must have suffered, together with the partial loss of the use of his whole hand, and the loss in his business, to be hereafter discussed—we do not think the verdict was excessive.

Appellant also complains that the court erred in allowing incompetent evidence as a basis for a com putation of the value of appellee's loss of time. Appellee is an insurance solicitor, whose remuneration depends upon the writing of insurance risks, and is based upon the amount of new business he secures. He was allowed by the court to state that his business loss during the time he was confined to his home

Digitized by Google

amounted to $1,000. Upon cross-examination it was developed that his earning money was entirely contingent upon his writing insurance risks, and thereupon appellant moved the court to exclude from the jury all the evidence relative to the loss of business, upon the ground that the profits of the business were entirely speculative, and therefore could not be considered as a legitimate element of damages. It is conceded by appellant that the plaintiff was entitled to recover for the value of his lost time occasioned by the accident, provided it resulted from his (appellant's) negligence. But he urges that there is a difference between the loss of business profits and the loss of time, and it must be conceded that he produces high authority for this position, although the cases upon which he relies with most confidence involved the loss of profits by reason of breaches of contract.

Shearman and Redfield, in their work on Negligence, section 739, say: "The liability of a defendant in an action upon negligence is broader than in an action for mere breach of contract." In the case of Louisville & Nashville Railroad Co. v. Reynolds, 71 S. W. 516, 24 Ky. Law Rep. 1402, the right to recover damages arising from loss of business in personal injury cases caused by tortious negligence was clearly recognized. In that case the plaintiff was a specialist physician, and was allowed to testify of his loss of business and possible profits by not being at his office during the time he was hurt. It was held that this was error, not because incompetent generally, but because the petition did not allege special damages. In this case the petition sufficiently alleges the special damages, being evidently prepared in the light of the Reynolds case.

In the case of City of Logansport v. Justice, 74

Digitized by Google

Ind. 378, 39 Am. Rep. 79, which was an action for damages for personal injuries caused by negligence, it was said on the subject in hand: "It is also claimed that the court erred in permitting the plaintiff to make proof concerning his professional earnings before his injury. In substance, the plaintiff is permitted to prove what his professional earnings had been per year for five years, and how much his business had fallen off during six months succeeding his injury. This was permitted to go to the jury under an allegation in the complaint that the plaintiff was damaged in his business, and asking a recovery for the same. The damages are for a personal injury. This evidence was inadmissible in estimating the value of time lost, but not as a basis of damages. Taken in connection with the demand of the complaint and the instruction of the court, the evidence was clearly admitted as a basis of damages. It has been held that similar evidence is competent, not as a basis of damages, but as a guide to the jury, to aid them in the exercise of their discretion."

In the case of New Jersey Express Co. v. Nichols, 33 N. J. Law, 436, 97 Am. Dec., 722, the court said: "The plaintiff, on his examination in chief, after proving that his business was that of an architect, was asked the following question: 'What was your average annual profits in your business?' To which he answered: 'The average was about $2,500, that is, the average income.' When the deposition was offered to be read in evidence, the defendant's counsel objected to the reading of this question and answer, for the reason that, if read in evidence, and allowed by the court to be considered by the jury, it would tend to lead the jury to an indefinite inquiry, which would be contrary to law. The court overruled the objection, and permitted the question and answer to be read to

Digitized by Google

the jury. In actions founded on contract, evidence of the loss of profits resulting from non-performance has, in some instances, been rejected as too speculative and uncertain to be made the means of arriving at compensation as the measure of damages. But in actions of tort, where the quantum of damages is very much within the discretion of the jury, evidence of the nature and extent of the plaintiff's business, and the general rate of profit he has realized therefrom, which has been interrupted by the defendant's wrongful act, is properly received, not on the ground of its furnishing a measure of damages to be adopted by the jury, but to be taken into consideration by the jury, to guide them in the exercise of that discretion which, to a certain extent, is always vested in the jury."

In the case of Allison v. Chandler, 11 Mich. 542, it was said: "But, whatever may be the rule in actions upon contract, we think a more liberal rule in regard to damages for profits lost should prevail in actions purely of tort, excepting perhaps the action of trover. Not that they should be allowed in all cases without distinction; for there are some cases where they might, in their nature, be too entirely remote, speculative, or contingent, to form any reliable basis for a probable opinion. And perhaps the decisions which have excluded the anticipated profits of a voyage broken up by illegal capture, or collision, may be properly justified upon this ground. Upon this, however, we express no opinion. But generally, in an action purely of tort, where the amount of profits lost by the injury can be shown with reasonable certainty, we think they are not only admissible in evidence, but that they constitute, thus far, a safe measure of damages."

We are of opinion that not only is the proposition that, in cases of tort, loss of profits from business may

Digitized by Google

be recovered as a part of the damages (proper allegation being made in the pleading), sustained by the great weight of authority, but the principle is based upon reason and justice. Why should one who has tortiously inflicted upon another a severe personal injury, which confines him to his home or bed, and necessarily takes him from his business, be heard to say that he ought not to pay anything because his victim cannot demonstrate to a mathematical certainty what his loss in profits is? If there is any uncertainty, ought not the doubt to be resolved in favor of the innocent, rather than the guilty? The rule contended for by appellant would place it out of the power of any but one receiving a fixed salary to recover for loss of business in a personal injury case. The plaintiff was an insurance solicitor, he could not tell when he would write a risk, and his profits depended entirely upon his securing risks for his company. That he would be able to secure a risk to-day or to-morrow, he could not tell, but during a long period of time he could say that he averaged a given sum. It seems to us that the evidence of what his business produced on a general average is competent for the consideration of the jury in estimating his loss. No lawyer or doctor can say that during any determinate period he would have been employed by a client or patient, yet each knows that year in and year out he makes an income approximately, during a long period of time, the same, although differing in individual years. This profit may be called uncertain, but the most prudent men habitually act upon it in the most important affairs of life. They marry and rear families, buy property, and borrow money upon the confident expectation of being able to meet the obligations growing out of these most important contracts with the incomes arising from their business. To say

Digitized by Google

that one may wrongfully inflict injury upon the person of a man whose income is dependent upon his own personality, the confidence of the public in his skill, energy, and integrity, and that the wrong-doer will not be required to make compensation for the loss of expected profits arising from the injury, would be to refuse compensation for the most serious item of damage. Indeed, this item of damage is more certain than several others whose legitimacy is conceded. Mental and physical pain—who can measure in terms of money these with any certainty of being even approximately accurate? And yet they are submitted to the jury in every case for their consideration in estimating compensatory damages. The general level of a man's income for a considerable period before the injury, while perhaps not an accurate, or even altogether satisfactory, measure of the damages, is worthy of the consideration of the jury in a case like this.

Appellant complains in his brief that he is the victime of public prejudice against automobiles. This may be true, and, if so, that prejudice is based upon the carelessness of a large number of automobilists of a character similar to that of which this record shows appellant was guilty. The owners of automobiles have the same right on the public highways as the owners of other vehicles; but, when one drives so dangerous a machine through the public thoroughfares, it is incumbent upon him to exercise corresponding care that the safety of the traveling public is not endangered thereby. When the owners of automobiles learn this, it is confidently believed that whatever prejudice may now exist against them in the public mind will entirely disappear, for the public is not usually prejudiced without cause.

Digitized by Google

Perceiving no error in the record, the judgment is affirmed.

CASE 45.—JAMES HARGIS WAS TRIED FOR MURDER, RESULTING IN A HUNG JURY, AND THE COMMONWEALTH APPEALS. QUESTIONS OF LAW DECIDED January 18.

124 356
125 135

Commonwealth v. Hargis

Appeal from Fayette Circuit Court.

1. Homicide—Principals—Accessories Before the Fact.—Under the statutes of the State which do not create or describe the crime of murder, or mention aiders and abettors or principals in the first or second degree, but merely fix the punishment for murder, and do not define the penalty for an accessory before the fact, but provide by Ky. Stats., 1903, section 1128, that, in all felonies, accessories before the fact shall be liable for the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principal be not taken or tried, the principal actor, the aider and abettor, and the accessory before the fact are all principals in the first degree, and may be accused and convicted as such.
2. Same—Indictment—Charging One with Being an Accessory.—Under Crim. Code. Prac., section 122, declaring that an indictment shall contain a statement of the acts constituting the offense in ordinary language in such manner as to enable a person of common understanding to know what is intended, and section 126, providing that an indictment must charge but one offense, but, if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative, where the indictment charges that H and others, in connection with J. and B., unlawfully, willfully, and with malice aforethought shot and killed C., and that prior to such time such persons entered into a conspiracy to kill and murder C., and pursuant thereto J. and B., with the knowledge and consent, and by

Digitized by Google

the direction and procurement of H. and said others, did unlawfully, willfully, and with malice aforethought shoot and kill C., and that, before the time of said murder, said H. and others did unlawfully, willfully, and with malice aforethought advise, incite, procure, and persuade said J. and B. to so shoot and kill C., and at the time of said shooting said H. and others were present conveniently near, and did unlawfully, willfully, and with malice aforethought aid, abet, counsel, advise, incite, and encourage said J. and B. to do said shooting and killing, H. may be convicted of murder on evidence either that he was an actual perpetrator of the act, or that he was present aiding and abetting, or that he was an accessory before the fact.

3. Criminal Law—Declarations of Conspirator—Proof of Connection with Conspiracy.—On the trial of H. for murder of C., committed pursuant to a conspiracy, evidence by the State that S. was seen at the time of the killing in company with the persons who killed C., and who were in the conspiracy, in connection with the testimony of W. that shortly prior to the visit of S. to him, in regard to killing C., H. who had spoken to him about killing C. had told him to stay at his home till H. sent for him, sufficiently connects S. with the conspiracy to make competent against H. the declaration of S. then made to W., that H. had sent to W. the money which S. then gave him, and wanted him to come that night to help kill C.

4. Same—Appeal—Rejection of Evidence—Res Gestae.—Declarations of a conspirator, made after the purpose of the conspiracy had been accomplished, not being admissible against his co-conspirators, unless competent as part of the res gestae, their rejection cannot be reviewed, it not clearly appearing how long after the commission of the crime they were made.

5. Homicide—Dying Declarations—Sense of Impending Death.—Declarations of deceased made after he was shot, from the effects of which he died the next day, "they have killed me at last," and that the shots came from a certain place, are admissible as dying declarations, they sufficiently showing that he was impressed with the fact that he could not live.

6. Criminal Law—Res Gestae—Declarations.—Testimony that witness heard the shots, saw C. during the shooting, that C. walked a few feet and fell, and witness immediately went to him, when he said they had killed him, and that the shots came from a certain place, show the declarations to be admissible as part of the res gestae.

Digitized by Google

7. Same—Declarations of Conspirators—Reference to Other Matters.—Though on a prosecution for murder of C., killed pursuant to a conspiracy, witness testified to conversations had by him with defendant and other conspirators relating to the killing of M. and C., prior to the death of either, he may not testify to conversations had with them in which the killing of M. alone was discussed, especially where M. was not killed till a year after C. was killed.
8. Same—Evidence—Inducements to Witness Not to Testify.—Testimony, on the trial of H. for murder of C., of a witness who was a party to the conspiracy to murder and familiar with its details that after the murder, and before H. was indicted, he offered witness money to leave the country and never appear or testify against him or any of the conspirators is competent.
9. Witnesses—Contradiction.—The State may contradict the testimony of defendant in a murder case as to money which, it had been testified, he had given a witness to induce him to leave the country and not testify, the jury being admonished as to the purpose of the contradicting testimony.

(No briefs—record out of office.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER.

The appellee, James Hargis, was put upon his separate trial under an indictment charging that: "James Hargis, Elbert Hargis, Ed Callahan, Alexander Hargis, and Jesse Spicer committed the crime of murder, as follows, viz.: That said James Hargis, Elbert Hargis, Ed Callahan, Alexander Hargis, and Jesse Spicer, in connection with Curtis Jett and William Britton, on the 24th day of January, 1905, in the County of Breathitt and State of Kentucky, did unlawfully, willfully, feloniously, and with malice aforethought, shoot and wound James Cockrill with guns and pistols loaded with powder and leaden ball and other hard substances, from which shooting and wounding the said Cockrill died in Fayette county on the following day. (2) The said James Hargis, Elbert Hargis, Ed

Digitized by Google

Callahan, Alexander Hargis, and Jesse Spicer, together with Curtis Jett, William Britton, and other persons unknown to the grand jury, on the 25th day of January, 1905, and prior thereto and before the finding of this indictment, formed and entered into a conspiracy with each other, the purpose of which conspiracy was to kill and murder James Cockrill, and pursuant thereto and in furtherance of said conspiracy and while the same existed, said Curtis Jett, William Britton, and others, to the grand jury unknown, with the knowledge and consent and by the direction and procurement of the said James Hargis, Alexander Hargis, Elbert Hargis, Ed Callahan, and Jesse Spicer, on the 25th day of January, 1905, in the county of Breathitt and State of Kentucky, did unlawfully, willfully, and with malice aforethought, shoot and wound James Cockrill, * * * and the said James Hargis, Elbert Hargis, Ed Callahan, Alexander Hargis, and Jesse Spicer, before the time of said killing, did unlawfully, willfully, feloniously, and with malice aforethought, advise, incite, procure, and persuade the said Curtis Jett, William Britton, and others unknown to the grand jury, to so shoot and wound and kill the said Cockrill, and at the time said shooting and wounding occurred, which resulted in the death of Cockrill as above stated, said James Hargis, Elbert Hargis, Ed Callahan, Alexander Hargis, and Jesse Spicer were present conveniently near, and did unlawfully, willfully, feloniously, with malice aforethought, aid, abet, counsel, advise, incite, and encourage the said Curtis Jett, William Britton, and others unknown to the grand jury, to do said shooting and wounding and killing." The jury failing to agree, were discharged, and the prosecution continued. For the purpose of having certain material and important questions of law, that arose during the

Digitized by Google

trial, settled for the guidance of the lower court on another trial, the commonwealth, under the authority of section 335, of the Criminal Code of Practice, and Commonwealth of Kentucky v. Matthews, 89 Ky. 287, 11 Ky. Law Rep. 505, 12 S. W. 333, Commonwealth of Kentucky v. Hourigan, 89 Ky. 305, 11 Ky. Law Rep. 309, 12 S. W. 550, has brought the record to this court.

The questions we are called on to consider, involve the refusal of the lower court to give certain instructions requested by the commonwealth, and relate to errors alleged to have been committed in the admission and rejection of evidence, the first and principal question being whether or not, the evidence authorizing it, the trial judge should have instructed the jury as requested by the commonwealth, that the defendant might be convicted of being an accessory before the fact. A sharp issue is here made between the State and the accused. In brief, the commonwealth insists that, under this indictment, he might be convicted of being the actual perpetrator of the act, or as aider and abettor actually or constructively present when it was committed, or as an accessory before the fact, and there being sufficient evidence to authorize the trial judge to give the jury instructions in behalf of the commonwealth submitting for their consideration these several views, he should have done so. For appellee it is urged that, in the same indictment the defendant cannot be charged with being the principal actor, as aider and abettor, and also as an accessory before the fact; that the charges are inconsistent, one accusation being that he was present, the other that he was absent, and therefore by the common law and statute they are separate offenses. The lower court accepted as correct the view of the defense, and refused to instruct the jury that they might convict the

Digitized by Google

accused if they believed that he procured, advised, or counseled Jett or others to kill Cockrill, although absent when the crime was committed, and instructed the jury, in substance, that there could be no conviction unless Hargis was the actual perpetrator of the crime, or was present at such shooting, correctly defining his presence as follows: "Was so near to the person or persons committing it that he could give to him or them aid or assistance in doing such shooting, or could give to him or them notice of the approach of danger, or could aid him or them in escaping detection or in evading or resisting arrest, and, if the defendant was in such position for the purpose on his part of giving such aid and assistance, or giving such notice, or of giving such aid and escape of protection, or of such evading or resisting of arrest, and if any of the persons who did such shooting knew, believed, or understood that the defendant was in any such position with any such purpose, this was a presence of the defendant at such shooting within the meaning of the law."

The importance of this question to the commonwealth and the accused will be more fully appreciated when it is understood that there was some evidence conducing to show that Hargis, although not the actual perpetrator of the crime, yet procured, counseled, and advised the murder of Cockrill. Whether or not he was present as an aider and abettor is a disputed question between the commonwealth and the accused—the evidence disclosing that he was in his store a short distance from the scene of the murder when it occurred. The commonwealth contends that he was there to render aid and assistance to the assassins, whilst the testimony for the defense tends to show that he was at the store attending to his business and knew nothing of their

Digitized by Google

murderous purpose. Under the common law a person might be guilty of the crime of murder as a principal in the first degree, the actual perpetrator of the crime, as a principal in the second degree, being present aiding and abetting the fact, as an accessory before the fact, in that, although absent at the time, the crime was committed, he yet procured, counseled, or commanded another to commit it. Blackstone, vol. 4, p. 36; Russell on Crimes, vol. 1, p. 47. Under the rules that prevailed under that system, it was always important for the prosecution to keep clearly in mind the technical distinction between the various degrees of the same crime. It is not necessary here to describe with more fullness the common-law procedure in the indictment and prosecution of aiders and abettors and accessories. Elaborate accounts that have now little more than historical value can be found in Hale's Pleas of the Crown, Russell on Crimes, and other standard authorities. Happily for the just and correct administration and enforcement of the law, and the protection and security of persons and property from the violence or viciousness of the criminal classes, the shadowy and confusing technicalities and distinctions of the common law have been supplanted by the simpler and more intelligent expressions of modern law as found in codes and statutes. It is scarcely necessary at this point to add that the common-law definition of those crimes that are punishable under the statute, although not described in it, must be followed, as in murder, burglary, and other offenses mentioned, but not defined, in our statute. But, when the offense is both created and described by statute, the common law as to it is abrogated, but when the punishment for a common-law offense is prescribed by statute, it is exclusive. Ky. Stats., 1903, sec. 1127. It may in fact be said

Digitized by Google

that the change has been more radical in the practice and procedure than in the description or definition of crime. Our statute does not create or describe the crime of murder, nor does it mention aiders and abettors or principals in the first or second degree. It merely fixes the punishment for murder. Nor does it define the penalty that shall be visited upon an accessory before the fact, but does make a radical change in the common law in the respect that an accessory may be tried and convicted although the principal has not been, providing in section 1128 that: "In all felonies accessories before the fact shall be liable to the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principal be not taken or tried, unless otherwise provided in this chapter." Therefore, it may safely be declared as the law in this commonwealth that the principal actor, the aider and abettor, and the accessory before the fact are all principals in the first degree and equally guilty, and may be so accused and convicted. The Constitution, in section 11, provides that "in all criminal prosecutions the accused has the right * * * to demand the nature and cause of the accusation against him," and, carrying out the central idea expressed in this wise provision, the Criminal Code of Practice in section 122, declares that an indictment shall contain: "A statement of the acts constituting the offense in ordinary and concise language, and in such a manner as to enable a person of common understanding to know what is intended, and with such degree of certainty as to enable the court to pronounce judgment on conviction according to the rights of the accused." And in section 126 it is laid down that: "An indictment except in the cases mentioned in the next section, must charge but one offense, but if it may

Digitized by Google

have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative." Under the latter section, although the indictment can charge only one offense, with the exceptions saved, the pleader is at liberty to describe the offense charged in as many different ways as may be necessary to present his case, keeping always in mind that the description of each mode and means of its commitment must be sufficient to give the accused full information of the crime charged, so that he may be prepared to meet it. In harmony with this rule of law it has been announced in a number of cases that in the same indictment a person may in one count be charged as a principal actor, and in another with being present aiding and abetting in its commission. Howard v. Commonwealth, 110 Ky., 356, 22 Ky. Law Rep., 1845, 61 S. W., 756; Cupp v. Commonwealth, 87 Ky., 35, 9 Ky. Law Rep., 877, 7 S. W., 405; Mulligan v. Commonwealth, 84 Ky., 229, 8 Ky. Law Rep., 211, 1 S. W., 417; Stricklin v. Commonwealth, 83 Ky., 566; 7 Ky. Law Rep., 627; Benge v. Commonwealth, 92 Ky., 1, 13 Ky. Law Rep., 308, 17 S. W., 146; Taylor v. Commonwealth, 90 S. W., 581, 28 Ky. Law Rep., 821.

It is, however, earnestly insisted by able counsel for the appellee that, although it is competent to charge in the indictment that the accused was the principal actor, and also an aider and abettor, as both imply the actual or constructive presence of the accused, he cannot further be charged as an accessory before the fact, because that necessarily imports his absence when the crime was committed, and consequently the accusations are radically different, and do not afford the defendant the accurate information of the accusation against him to which he is entitled under the Constitution and laws. In support of this

Digitized by Google

position, our attention is called to the case of Able v. Commonwealth, 5 Bush, 698, as conclusively settling this question. The facts of that case were that Able was indicted and convicted of the offense of grand larceny. The evidence established that Able lived about two miles from Gibson—the person whose property was stolen—and that Able procured a young man who lived with Gibson to commit the theft, which he did, delivering the money to Able at his place of residence some distance away. The court held that Able, under the indictment charging him with being the principal actor, could not be convicted of being an accessory before the fact, which in truth he was. There is, however, a marked distinction between that case and the one at bar. There, the indictment did not comply with the constitutional and statutory provisions cited, as it failed to inform Able of the facts under which a conviction would be sought. Under the indictment before us, a man of common understanding cannot read it without being fully advised of the charges that he will be called on to answer. The accused was notified by it that he was charged with the murder of Cockrill: (1) By actually committing the act. (2) With having entered into an arrangement or conspiracy with Jett and others to murder him, and that, while the conspiracy existed, they did by his counsel and procurement and with his knowledge, commit the act. (3) That he advised and encouraged Jett and others to perpetrate the crime, and, at the time of its commission, was conveniently near and aiding and abetting in its commitment. It is true that the statuate yet preserves the technical crime of accessory before the fact, but it has been stripped of the confusing distinction of the common law. In fact, as admirably put by Bishop in his new Criminal Law,

Digitized by Google

section 673: "This distinguishing of the accessory before the fact from the principal is a pure technicality. It has no existence either in natural reason or the ordinary doctrines of law, for in natural reason the procurer of the crime is not chargeable differently from the doer. And a familiar rule of the common law is that what one does through another's agency is regarded as done by himself. Likewise, in morals there are circumstances wherein we attach more importance to the accessory before the fact than to his principal. We can only conjecture how this distinction came into law—probably from the same confused apprehension whence sprang the now exploded distinction between principals and accessories at the fact. Having, however, become established as a technical rule, it cannot be removed by the courts. Still, since this distinction has no foundation in reason, our judges are permitted to extend it no further than compelled by the authorities." And in Stricklin v. Commonwealth, 83 Ky. 566, 7 Ky. Law Rep. 627, this court ruled that there was practically no distinction between accessories before the fact and principals and, in effect, that a person in the same indictment might be charged as an accessory and as principal—holding: "In the commission of the offense of murder, there may be an accessory before the fact as well as a principal, but both are in law guilty of the offense, and by our statute their punishment is made the same. But whether the person charged with the offense of murder be guilty as principal or accessory, depends upon the particular circumstances of the offense charged; that is, whether he, being present, actually committed the crime, or aided and assisted in committing the homicide, or not being present, with felonious intent incited, procured or advised it. It was, therefore, not a departure from the rules of

Digitized by Google

pleading prescribed by the Criminal Code to denominate the offense with which the appellant was charged in the indictment, as murder." It is true that, under an indictment charging the accused merely as an accessory before the fact, he could not be convicted as the actual perpetrator of the crime, because the indictment would not advise him, as required, of the accusation against him, or prepare him to meet fairly the prosecution, and so, under an indictment charging one with being the perpetrator of the act, he could not be convicted on evidence that he was an accessory. But when, in an indictment for murder against two or more persons, it is alleged that the crime was committed in pursuance of an agreement, arrangement, or conspiracy, it may charge the accused as being the actual perpetrators of the act, also as being aiders and abettors in its commission, and as being accessories before the fact in procuring, advising, and counseling its commission, and under such an indictment, the evidence authorizing it, the accused may be convicted as the actual perpetrator of the act, or as being actually or constructively present as an aider or abettor, or as having counseled, advised, and procured its commission, although absent or present but not as an aider or abettor when it was committed. This conclusion seems necessarily to follow from the proposition that the aider and abettor and the accessory before the fact are principals in the commission of the crime equally with the actual perpetrator of the deed, and punishable in the same manner. Therefore the indictment before us only charges one offense, that of murder. But as authorized by section 126 of the Criminal Code of Practice, it is described as having been committed in different modes and by different means. The trial judge, the evidence authorizing it, should

Digitized by Google

have instructed the jury that they might find the accused guilty as the actual perpetrator of the act, or as an aider and abettor, or as having counseled or procured the commission of the crime although absent when it was committed, or even present but not as an aider and abettor.

The errors in the admission and rejection of testimony may be briefly disposed of. Anse White, introduced as a witness for the commonwealth, testified, in substance, that in March, 1902, Hargis gave him a pistol and told him to go to the courthouse and if any trouble came up there to kill Cockrill, Cox, and others. Soon afterwards, White returned the pistol to Hargis who told him to go to his home and stay there until he sent for him. White was then asked if, shortly after this conversation with Hargis, any person came to see him, and if so, to relate what the person said. The avowal made shows that the witness, in answer to the question, would have testified, if permitted so to do, that, a short time after he left Hargis, Asbury Spicer came to his home and gave him a roll of money which he said had been sent him by Jim Hargis and Ed Callahan, and that they wanted him to come to Jackson that night to help, in connection with Jesse Spicer and others, kill Dr. Cox or Jim Cockrill, or both, but that he returned the money to Spicer and refused to go or have anything to do with the matter, and a very short time after that Dr. Cox was killed. Previous to the offer to introduce this evidence, the commonwealth introduced witnesses who testified that they saw Asbury Spicer in the courthouse upstairs in the room from which Cockrill was shot. There is no evidence that Spicer ever had any conversation with Hargis or any of his codefendants in regard to the killing of Cockrill, or that he had ever been seen in the presence

Digitized by Google

of any of them, nor was he indicted. It is the contention of the commonwealth that Spicer's connection with the conspiracy to murder Cockrill was sufficiently established by the evidence that he was seen about the window or place where the persons who killed Cockrill were stationed to warrant the inference that he was a member of the conspiracy, and therefore his declarations were competent against his co-conspirators. The admission of evidence of this character depends on whether or not the evidence preceding it has connected the declarant with the conspiracy in such a way as to make his declarations competent against his co-conspirators. All conspiracies must necessarily be established largely by circumstantial evidence; indeed, we might say by a series of facts and circumstances. There is little difficulty in laying down the law applicable to the declarations and acts of a conspirator in furtherance of, and made with reference to, the conspiracy. The trouble arises when it is attempted to apply the law to the facts. In Greenleaf on Evidence, vol. 1, sec. 111, it is said:

"Declarations of conspirators in regard to the common design are competent when a foundation has been laid by proof sufficient to establish prima facie the fact of conspiracy between the parties or proper to be laid before the jury as tending to establish such fact. The connection of the individuals in the unlawful enterprise being thus shown, every act and declaration of each member of the confederacy in pursuance of the original concerted plan and with reference to the common object is in contemplation of law, the act and declaration of them all, and is therefore, original evidence against each of them. It makes no difference at what time any one entered

Digitized by Google

into the conspiracy. Every one who does enter into a common purpose or design is generally deemed, in law, a party to every act which had before been done by the others and a party to every act which may afterwards be done by any of the others in furtherance of such common design." Powers v. Commonwealth, 110 Ky., 386, 61 S. W., 735, 22 Ky. Law Rep., 1807, 53 L. R. A., 245. And in Wright on Criminal Conspiracies, page 216, it is said: "Nor is responsibilities for the acts of co-conspirators limited to the acts of those indicted, for there may be members of a conspiracy outside of the jurisdiction of the trial court but whose participation in the work of those on trial makes proof of their acts admissible to charge the defendant." Therefore, when the commonwealth introduced evidence showing that Asbury Spicer was seen in company with the persons who killed Cockrill, at the time the fatal shots were fired, and who were in the conspiracy, this, in connection, with White's testimony, that previous to the visit of Spicer, Hargis had told him that he would send for him when he wanted him, and shortly thereafter Spicer came to see him for the purpose before stated, sufficiently connected him with the conspiracy to make competent against his co-conspirators declarations made by him previous to the murder.

Blanton, a witness for the commonwealth, testified that he was in the street near the courthouse when the shooting began, and immediately afterwards ran to the courthouse for the purpose of ascertaining who fired the shots; that, when he got to the courthouse door he saw Curtis Jett, Jesse Spicer, and Bill Britton, the two former standing in the front door of the courthouse, Jett with his pistol in his hand. He was asked what Jett said, and the avowal was made that Jett's reply was: "This is the thing that

Digitized by Google

laid him on the cooling board. I will now go across the street and see my relatives"—and that Jett then crossed the street to the store of Hargis. It does not clearly appear how long after the fatal shots were fired this declaration was made. When it was made, the object of the conspiracy had been accomplished, and Jett had left the place from which the shots were fired, and therefore the declarations of Jett were not competent against his co-conspirators, unless they can be admitted under the res gestae rule. Although it is well established that the acts or declarations of a conspirator are not admissible against his co-conspirator after the purpose of the conspiracy has been accomplished, yet, if they are so near the time of its accomplishment as to be a part of the act itself, and not mere narratives of past events, they will be competent as a part of the res gestae. We are not prepared to say that the trial judge did not correctly reject this evidence, as it does not satisfactorily appear that it was near enough to the act of killing to be a part of it. and therefore admissible.

Bowling, who was near Cockrill when he fell, and immediately went to him, was asked what Cockrill said. The avowal is made that he would testify if permitted that Cockrill said: "Oh, Bowling, they have killed me. Oh Lord, they have killed me at last." That he then asked Cockrill who killed him, and he said: "I don't know, but the shots came from the courthouse window." Cockrill was fatally wounded, and died on the following day. The evidence does not show whether or not Cockrill knew his condition, and therefore it is urged that the evidence was incompetent as a dying declaration, as these declarations are only admissible when made under a sense of impending dissolution. The question

Digitized by Google

is, is a statement made immediately after a person has been fatally wounded competent as a dying declaration when the evidence does not show that he knew that his wounds were fatal. In Peoples v. Commonwealth, 87 Ky., 487, 10 Ky. Law Rep., 517, 9 S. W., 509, 810, this court said: "The law does not require as a condition to the competency of a statement as a dying declaration that the injured party shall in express words declare that he knows that he is about to die, or that he shall make use of equivalent language. His recognition of impending dissolution may be shown in this way, but the law does not limit it to this mode alone." Evidently Cockrill was impressed with the fact that he could not live, as he exclaimed: "They have killed me at last." He, in fact, died the next day, and there is not the slightest suggestion that, when the statement was made, he had any hope of recovery. We are of opinion that his declaration under the circumstances was competent as a dying declaration. Commonwealth v. Matthews, 89 Ky., 287, 11 Ky. Law Rep., 505, 12 S. W., 333; Green v. Commonwealth, 18 S. W., 515, 13 Ky. Law Rep., 897; Baker v. Commonwealth, 106 Ky., 212, 50 S. W., 54, 20 Ky. Law Rep., 1778. Aside from the competency of this evidence as a dying declaration, it was admissible as a part of the res gestae. The witness Bowling testified that he heard the shots, saw Cockrill during the shooting, and that Cockrill walked a few feet and fell, and immediately the witness went to him, when the statement above mentioned was made. The rule as to the admission of statements as a part of the res gestae is correctly stated in American & English Encyclopedia of Law, vol. 24, page 680, as follows: "The declaration of the deceased as to the cause and circumstances of the homicide will not be admissible if

Digitized by Google

they are made at such a time subsequent to the occurrence of the main facts in issue, and under such circumstances as clearly render them mere narratives of past event, but the great weight of authority is that the true test of the competency of the evidence is not whether the declarations were made after the act of homicide was done, but they will be admissible as part of the res gestae if made after the lapse of so brief an interval, and in such connection with the principal transaction, as to form a legitimate part of it, and to preclude the presumption that they are the result of premeditation and design." And this statement of the law is fully supported by Greenleaf on Evidence, vol. 1, sec. 126, and Wigmore on Evidence, vol. 3, sec. 1745; Norfleet v. Commonwealth, 33 S. W., 938, 17 Ky. Law Rep., 1137; Hughes v. Commonwealth, 41 S. W., 294, 19 Ky. Law Rep., 497.

Mose Feltner testified as to a conversation he had with the accused and other conspirators relating to the assassination of Marcum and Cockrill previous to the death of either of them. The commonwealth also offered to prove by him that he had other conversations in which the killing of Marcum, but not Cockrill was discussed. What occurred in these latter conversations when the name of Cockrill was not mentioned, the trial judge rejected, and properly so. The accused was on trial for the killing of Cockrill, and statements made by him in respect to Cockrill were admissible, but conversations had, however wicked their intention or murderous their purpose, were not competent unless they related or referred in some way to Cockrill. Especially is this true in view of the fact that Marcum was not killed until May, 1903, Cockrill being murdered in July, 1902. This witness was inquired of at length concerning conversations with Hargis, and the execution of a

Digitized by Google

note and payment of money by Hargis to him in 1904, some two years after Cockrill was killed and before Hargis was indicted for his murder. The evidence of this witness discloses that he had frequent conversations with Hargis in regard to the murder of Cockrill, and was fully acquainted with, and advised of, all the plans and arrangements made for it. And that in 1904 Hargis said to him, mentioning the Cockrill case, that he, Hargis, would give witness several hundred dollars provided he would leave the country and never appear or testify against Hargis or any of the conspirators. This evidence was competent. Its weight and sufficiency was for the jury. Feltner was a party to the conspiracy, familiar with its details, and therefore a material witness against Hargis in the event of prosecution, and, if Hargis, with a view of depriving the commonwealth of his testimony, offered to pay him to leave the State and not appear as a witness, his statements as to what Hargis said in connection with the payment of the money was entirely competent, and the lower court properly permitted it to go to the jury.

Complaint is also made that minor errors were committed in the admission of evidence, relating to the note and check given Feltner. The court permitted several witnesses to contradict the testimony of Hargis respecting this transaction. The evidence concerning this note and check was very material to the commonwealth, and hence damaging to the accused, and it was permissible for the commonwealth to contradict, if it could, the material statements of Hargis made with reference to this transaction, admonishing, of course, the jury of the purpose for which the evidence was admitted.

This opinion will be certified to the lower court as the law of this case.

Digitized by Google

CASE 46.—PROSECUTION AGAINST TOM HARDY FOR BRINGING LIQUOR INTO A LOCAL OPTION DISTRICT.—January 22.

Commonwealth v. Hardy

Appeal from Cumberland Circuit Court.

H. C. BAKER, Circuit Judge.

From a judgment sustaining a demurrer to the indictment the Commonwealth appeals. Affirmed.

Local Option Districts—Carrying Whisky Thereto for Hire—Indictment—Insufficient Allegations.—Under an act to regulate the carrying, etc, of intoxicating liquors into local option districts (Acts of 1906, page 320), providing "that every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof," an indictment against an individual for carrying whisky into a local option district and delivering it to another, which failed to allege that he received pay therefor, is not good.

C. R. HICKS for appellant.

N. B. HAYS and C. H. MORRIS, of counsel.

Our contention is that the mere bringing into and delivering of spirituous liquors into a local option district, is a violation of chapter 63 of the Act of the Legislature of Kentucky of 1906, to regulate the carrying, etc., of intoxicating liquors into such districts, whether the person carrying and delivering the liquor, does it for hire or not.

(No brief in record for appellee.)

Digitized by Google

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

The appellee, Tom Hardy, was indicted by the grand jury of Cumberland county, charged with the offense of "bringing into, and delivering, spirituous, vinous, and malt liquors, to another person," in a district where the sale of intoxicating liquors had been prohibited. The indictment was drawn under an act of the General Assembly of the commonwealth of Kentucky entitled "An Act to regulate the carrying, moving, delivering, transferring or distributing of intoxicating liquors in local option districts." Acts of 1906, p. 320, c. 63. Section 4 of the act in question contains the following proviso: "Provided further, that the provisions of this act shall only apply to common carriers, corporations, firms or individuals who usually carry freight or goods for hire, and every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof."

A general demurrer was sustained to the indictment because it failed to charge that the accused brought the liquor into the prohibited district and there delivered it to V. A. Vaughn for pay. The correctness of the judgment of the court in dismissing the indictment for the reason above stated is the question arising on this appeal.

The proviso in section 4 limits the operation of the act to common carriers, corporations, firms, or individuals who usually carry freight or goods for hire; and they are guilty of an offense under the statute only when they receive pay. Of course, if it were alleged that the defendant was a common carrier, it

Digitized by Google

would be presumed that he carried the prohibited goods for pay; but, as there is no such allegation as to the defendant, nor any that he received pay for carrying and delivering the liquor, the indictment fails to state a cause of action against him. If it had been alleged that the accused was paid for the delivery of the liquor, the indictment would have been good. The statute is aimed at carriers for hire; the Legislature evidently deeming that, if these were prohibited from carrying the forbidden freight, the evil sought to be eradicated would be stamped out.

The demurrer to the indictment was properly sustained, and the judgment of the trial court dismissing it is therefore affirmed.

CASE 47.—ACTION BY ROBERT F. WIEMER AGAINST THE COMMISSIONERS OF THE SINKING FUND OF THE CITY OF LOUISVILLE TO RECOVER CERTAIN LICENSE TAX.—January 22.

124 377
f126 838

Wiemer v. Comr's Sinking Fund of Louisville

Appeal from Jefferson Circuit Court, Chancery Branch (Second Division).

SHACKELFORD MILLER, Judge.

Judgment for defendants. Plaintiff appeals. Affirmed.

1. Statutes—Title—Subject of Act—Licenses.—Acts 1904, p. 93, c. 33, entitled "An act to amend the revenue laws of cities of the first class so as to carry into effect the amendment of section 181 of the present Constitution," by section 2 repeals Ky. Stats., 1903, section 3011, providing for the

Digitized by Google

licensing of trades, professions, and the keeping of vehicles and other property enumerated, in addition to taxation under the ad valorem system. Const., section 181, provides that the General Assembly may authorize cities to adopt a license system in lieu of ad valorem taxation in raising local revenue. Held, that Acts 1904, p. 95. c. 33, section 2, is not germane to the title of the act, and therefore is in conflict with Const. section 51, providing that no law shall relate to more than one subject and that shall be embraced in its title; but, as that section has no natural connection with the remainder of the act, the validity of the remainder is not affected.

2. Same.—The title to an act, in order to meet the constitutional requirement that an act shall not relate to more than one subject, which shall be embraced in the title, need not contain all the details of the body of the act; but the title should be so related to the body of the act as to naturally embrace it in the terms of the title.

LANE & HARRISON, CHANDLER & NORMAN and D. W. SANDERS, for appellant.

(No brief in record for appellant.)

A. P. HUMPHREY and A. E. RICHARDS, attorneys for appellees.

1. The Statute approved February 19, 1906, entitled "An Act to enable cities of the first class to construct a comprehensive system for the disposition of sewerage," which authorizes the organization of a subsidiary corporation to plan and construct the sewers, is not such special or local legislation as is prohibited by section 59 of the Constitution.

2. An ordinance drawn in compliance with section 159 of the Constitution should provide "for the collection of an annual tax sufficient to pay the interest on said indebtedness and to create a sinking fund for the payment of the principal thereof," by naming a fixed sum to be annually collected and appropriated regardless of the variable amount of property taxable for municipal purposes.

AUTHORITIES CITED.

Carrollton Furniture Mfg. Co. v. The City of Carrollton, 104 Ky., 530; Richardson v. Mehler, 111 Ky., 426; Louisville School Board v. Superintendent of Public Instruction, 102 Ky., 394; Shoemaker v. Hodge, 111 Ky., 436; Wooley v. City of Louisville, 114

Digitized by Google

Ky., 556, 569; Louisville v. Wehmoff, 116 Ky., 813; City of Louisville v. Louisville School Board, 27 Ky. Law Rep., 209; Commissioners v. Louisville, 114 Ky., 571; Farson, Leach & Co. v. Board, 97 Ky., 119; Commissioners v. Grainger, 98 Ky., 319; Commissioners v. Zimmerman, 101 Ky., 432; Board of Park Commissioners v. DuPont, 110 Ky., 743; Walston v. City, 66 S. W., 385; Cooley on Taxation, vol. 1, 3rd Ed., 557; Pettibone v. The West Chicago Park Commissioners, 215, Ill., 313; Hodges v. Crowley, 186 Ill., 305; Cooley on Taxation, p. 597; City of East St. Louis v. Amy, 120 U. S., 600; Bassett v. City of El Paso, 88 Tex., 168, 30 S. W., 893; Mitchell County v. The Bank, 91 Texas, 261; Howland v. The Board of Supervisors, 109 Cal., 152; Epping v. Columbus, 117 Ga., 278; Village of Canandaigua v. Hayes, 85 N. Y. Sup., 494.

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

This is an action instituted by the appellant, Robert F. Wiemer (the plaintiff below), on behalf of himself and all others similarly situated, to recover of the Commissioners of the Sinking Fund of the City of Louisville certain license taxes paid on vehicles for the years 1904 and 1905, amounting in the aggregate to $75,000. The right of recovery is based on the theory that there was no authority in the charter of cities of the first class to support the ordinance under which the licenses were imposed and collected after the repeal of section 3011, Ky. Stat., 1903, by section 2 of the amending act adopted in 1904.

The first, and, from the view we have taken of it, the controlling, question in the case, is whether or not section 2 of the statute enacted by the General Assembly in 1904 is germane to its title. If the question must be answered in the negative, then the act is in contravention of section 51 of the Constitution, which, among other things, provides "that no law enacted by the General Assembly shall relate to more than one subject, and that shall be embraced in the title,"

Digitized by Google

and is therefore void, and the judgment of the chancellor dismissing the petition must be affirmed for that reason. The title of the act in question is "An Act to amend the revenue laws of cities of the first class so as to carry into effect the amendment of section 181 of the present Constitution." Acts 1904, p. 93, c. 33. As conducive to a clear understanding of the question about to be discussed, it is necessary to bear in mind that one of the most important principles of the Constitution as adopted in 1891 was the imperative requirement that the ad valorem system should be applied in all matters of taxation, whether State, county or municipal. In addition to the ad valorem system, revenue was permitted to be raised by licenses on occupations, incomes, etc. As to municipalities, the license system was especially provided for by section 181 of the Constitution. But the substitution of a license for the advalorem system was illegal under the Constitution. Levi v. City of Louisville, 97 Ky. 394, 16 Ky. Law Rep. 872, 30 S. W. 973, 20 L. R. A. 480. Under the Constitution as thus construed the city of Louisville adjusted its fiscal system to the property subject to taxation by it, applying the ad valorem system as was required by the fundamental law, and in addition it inaugurated and put in force a license system, by which to derive an income on various named callings, occupations, professions, and articles of property. Of necessity, such a system was most elaborate and extensive in its details, and we do not deem it necessary to more than generally allude to it, except in so far as it is absolutely necessary for a full comprehension of the question before us.

One of the departments of the fiscal system of Louisville is the "Commissioners of the Sinking Fund," a corporation established for the purpose of

Digitized by Google

receiving and collecting certain specified revenue and applying it to the payment of the principal and interest of the bonded indebtedness of the city as it falls due. Among the resources of the sinking fund are all licenses on trades, occupations, and professions, imposed in addition to the ad valorem system. A general power to impose these is provided in sections 2980 and 3012 of the Kentucky Statutes of 1903 (charter of cities of the first class), and specifically by section 3011. This last section contains a large number of named subjects of license, and provides a maximum and minimum therefor. Between the maximum and minimum provided by the statute the general council is permitted to exercise its discretion in fixing the amount of the license. That nothing subject to be licensed should be overlooked or omitted in the grant of power to the council, section 3012 was enacted, which substantially provides that any subject of license not specifically provided for in section 3011 may have an annual license imposed upon it of not less than $5 and not more than $5,000. Under this grant of power the general council of the city of Louisville ordained ordinances imposing license taxes upon all of the subjects of such a system of taxation, and applying the revenue arising therefrom to the purposes of the sinking fund. Among the things upon which a license tax was imposed were vehicles.

No question is, or can be, made of the validity of the collection of a license tax on vehicles from 1893, when the charter was enacted, to 1904, when the act in question went into effect. From the date of the decision in Levi v. City of Louisville, the merchants and manufacturers of the city of Louisville began an agitation in favor of an amendment to the constitution permitting municipalities, if they so desired, to adopt a license system in lieu of ad valorem taxation

Digitized by Google

what shall have operation. It is no answer to say that the title might have been made more comprehensive, if in fact the Legislature have not seen fit to make it so." 26 Am. & Eng. Ency. of Law (2d Ed.), p. 589, thus states the rule of the relation required to exist between the title and the body of a statute: "While it is true that a title expressing the general subject will cover a great variety of related matters, yet it cannot support a provision foreign to such subject. Therefore an act containing provisions neither expressed in or suggested by the title, nor germane nor cognate to the subject expressed therein—in brief, matters not reasonably to be anticipated under such a title—it is to that extent repugnant to the constition. And the connection between the provisions of the act and the subject stated in the title must be so obvious that ingenious reasoning is not requisite to show it. It should be apparent to the ordinary intellect as well as to the trained legal mind. Where the language employed in the title is such as would lead a reasonable man to suppose that the Legislature intended to restrict the scope of the act within certain limits specified in the title, such act is unconstitutional so far as concern any provisions outside the limits thus marked out, even though such provisions might properly have been included in the act under a broader title. But, if the repealing clause professes to repeal acts dealing with a subject not expressed in the title or germane to the subject there expressed, it is to that extent invalid."

There is no such natural relationship between licenses on occupations imposed in addition to ad valorem taxes and a system of licenses imposed on personal property in lieu of ad valorem taxes as would lead the ordinary mind to conclude that a statute whose title was expressly limited to one might

Digitized by Google

also contain the other. On the contrary, expressly naming one of them in the title excludes the expectation of finding the other affected by the body of the statute. The statute in question, by its terms, seems to restrict the body of the act of 1904 to licenses imposed on personal property in lieu of the ad valorem taxes which, before the amendment, the constitution had imposed. That this substitution might take place was the sole purpose of the amendment of the constitution, and to make the substitution was all that was necessarily involved in an act putting the amendment in force. Suppose we turn the proposition around, and the title be made to read, "An Act amending the revenue laws of cities of the first class as to the occupation licenses imposed for the purposes of the sinking fund;" would any ordinary mind expect to find in the body of an act with this title a section relating alone to licenses imposed on personal property in lieu of ad valorem taxes? We do not think so. And yet this is the precise point involved in this litigation. The relationship between the two subjects is the same, whether considered from one or the other points of view.

Perhaps a case could not be found which better illustrates the danger of associating incongruous subjects in the body of a statute than the one under discussion. Here is a law, the main subject of which has no relation to occupation licenses, by which section 3011, Ky. Stat., 1903, which relates alone to such licenses, is repealed and at once re-enacted, omitting two or three subjects of license. That the omission was made by inadvertence appears from the fact that the beneficiaries of the omission did not know of it for two years after it took place, and continued during that time paying the annual license without protest.

Digitized by Google

The sinking fund commissioners did not know of it, and continued to collect the licenses as before. So that we have the result that, because the title did not indicate the contents of the body of the bill, a change in the law in regard to the sinking fund is made, reducing its revenue some $75,000 per annum, without any of those interested in the change becoming aware of it for two years. In the same manner section 3011 might have been repealed without any part being re-enacted, and the city's credit entirely ruined.

The rule is that when a subject foreign to the title is introduced into the body of an act, if it is so separate and distinct from the remainder of the subject-matter of the legislation that it may be omitted without affecting the otherwise valid portions, then the unconstitutional part will be omitted and the remainder allowed to stand. Such is the case here. Section 2 has no natural connection with the remainder of the act. Its omission leaves a valid and complete statute; and therefore we hold that section 2 is invalid for the reason given, but the remainder of the statute is constitutional.

As this was the conclusion reached by the chancellor, his judgment is affirmed.

Digitized by Google

CASE 48.—ACTIONS BY B. F. DEVERS AGAINST CHARLES B. MAY AND OTHERS, AND BY SAME PLAINTIFF AGAINST M. D. MARTIN AND OTHERS INVOLVING A RENT CONTRACT AND THE OWNERSHIP OF CERTAIN EMBLEMENTS.—January 22.

Devers v. May, &c.
Same v. Martin, &c.

Appeal from Harrison Circuit Court.

L. P. FRYER, Circuit Judge.

From the judgments plaintiff appeals. Affirmed in the first, and reversed in the second action.

1. Landlord and Tenant—Enjoyment of Premises—Refusal of Lessor to Place Lessee in Possession—Measure of Damages.—Where a lease of a farm is entered into and the lessor refuses to place and keep the lessee in possession according to its terms, the lessee's measure of damages is the difference between the price he agreed to pay and the actual rental value of the property, together with special damages on the facts authorizing them.
2. Same.—Where a lessor refuses to place and keep the lessee in possession according to the terms of the lease, the lessee may recover in one action the difference between the price he agreed to pay and the actual rental value of the property, and such special damages as he has sustained.
3. Same.—Where a lessor of a farm refuses to place and keep the lessee in possession, the lessee to recover general or special damages need not allege or prove any effort to rent other land or to engage in other occupations; the recovery not being for loss of time or services, but as damages for breach of a contract for the use of specific property.
4. Same—Evidence—Admissibility.—In an action by a lessee for the refusal of the lessor to place and keep him in possession of the premises, evidence that the premises for the term of the lease were worth a specified sum more for the uses for

Digitized by Google

which the lessee had rented it than the agreed rent was admissible on the issue of damages.

5. Same—Crops—Rights of Tenant.—Ky. Stats., 1903, sections 3862, 3863, provide that all the emblements of the lands of a person dying after the 1st day of March which shall be severed before the last day of December following shall be assets in the hands of his personal representative, and all the emblements growing on the lands the last day of December or at his death, if that shall happen after that date and before the 1st day of March, shall pass with the land to the heir or remainderman. An owner of a third person's life estate executed in September, 1903, a lease thereof to a lessee for a term of one year from March 1st following. In October, 1903, the third person died. Previous to his death the lessee had sown wheat on the premises. Held that, as the lessee occupied the same relation towards the premises as the life tenant did, he was not entitled to an interest in the wheat as emblements, because though the life tenant died after March 1st of that year, the wheat could not be severed from the land before the last day of December following.

J. J. OSBORNE counsel for appellant.

POINTS AND AUTHORITIES CITED.

1. On question as to measure of damages recoverable by Devers from Martin & Drane. (Smith v. Phillips, Jr., 16 Ky. Law Rep., 615; Wells v. Nat'l Life Ass'n Hartford, 53 L. R. A., 98 99 100, 103; Sutherland on Damages, 3rd Ed., sections 863, 864, 865; Page on Contracts, vol. 3, section 1588.)

2. As to appellant's right to emblements in the wheat. (Bradley v. Bailey, 1 L. R. A., 427; Lawson's Rights, Remedies and Practice, vol. 6, section 2682; Moreland, &c., v. Myall, &c., 14 Bush, 478; Lafferty v. Schuylkill River East Side R. R. Co., 3 L. R. A., 124; Batterman v. Allbright, 11 L. R. A., 801; Redmon v. Bedford, &c., 80 Ky., 13; Ky. Statutes, sections 3863, 3864, 3865; Acts 1851, page 251.)

3. On the proposition that where a party, by his own contract, creates a duty or charge upon himself, he is bound to make good his undertaking, notwithstanding any inevitable necessity, or accident, or act of God. (Lawson's Rights, Remedies and Practice, vol. 5, section 2520, and cases cited in Note 6; 44 L. R. A., 557, Smith v. N. American Transportation & Trading Co.: 14 L. R. A., 215, Stewart v. Stone; 21 L. R. A., 645, Renny v. Olds; 57 L. R. A., 707, Southern Pacific Co. v. H. A. Schoer; 6 J. J. Marshall, 527, Singleton v. Carrol, etc.; 3 T. B. Monroe,

Digitized by Google

376, Bohannon v. Lewis; and also page 138, same book, Beatty v. Scrivener; 14 B. Monroe, 332, Sweeney v. Owsley; 18 Am. Reports, 39, The District Township &c., v. Smith; 82 Am. Dec., 349, Tompkins v. Dudley; 72 Am. Dec., 373, Supt. &c., Public Schools of Trenton v. Bennett, &c.)

W. S. CASON, attorney for appellees C. B., H. S., and Anna S. May.

A concise definition of emblements, limited to the circumstances of the case on trial would be, that it is the right of the tenant of a life tenant to enter upon the land after the death of the life tenant, to harvest the crop sown by him before the death of the life tenant. (Ky. Statutes, sections 3862, 3863, 3864, 3865.)

M. C. SWINFORD, attorney for appellees, Martin and Drain.

We hold to the view that where there has been nothing wilful on the part of the lessor in the failure to carry out a contract of rental, and no damages are alleged as to any extra trouble or expense sustained by the lessee by reason of any conduct on the part of the lessor, that only actual damages can be recovered.

AUTHORITIES CITED.

Smith v. Phillips, 16 Ky. Law Rep., 675; Newman on Pleading, 336, 357, 360 and 382; Sousley v. Burns, Adm'r, 10 Bush, 87; Miles v. Miller, 12 Bush, 134; Lanigan v. Kille, 39 Am. Rep., 797 (97 Pa., 120); Chamberlain v. McAllister, 6 Dana, 352; E. & P. R. R. Co. v. Pottinger & Bro., 10 Bush, 185; Koch v. Godshaw, 12 Bush, 318.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming in first case and reversing in the second.

These two cases growing out of the same transaction will be disposed of together. Martin and Drain owned the life estate of J. C. May in a tract of land containing about 120 acres. On September 2, 1903, they entered into the following contract with the appellant, Devers: "M. D. Martin hath this day rented or leased to B. F. Devers the farm known as

Digitized by Google

the May farm, adjoining W. A. Webber, containing 120 acres of land, for the term of one year, that is, from the first day of March, 1904, to the first day of March, 1905. The west field about 36 acres, that is in corn and tobacco, is to be put into wheat, and either clover or timothy. The field next to it and between it and the toll house is, to be put into corn and tobacco, not more than six acres of tobacco. The balance of the farm to remain in grass. Devers is also to make a good and substantial woven wire fence along the pike from the gate that goes into the west field to the toll house, and to pay Martin and Drain $200 on the 1st day of August, 1904, $100 on the 1st day of January, 1905, and $100.00 on the 1st day of March when the lease expires, and to give peaceable possession." In October, 1903, J. C. May died, but previous to his death Devers had built the fence mentioned in the contract and had sown the wheat. The death of Mr. May terminated the interest of Martin and Drain in the land, and it became the property of the appellee Charles B. May and the other children of J. C. May. Soon after the death of May, Martin and Drain surrendered to Devers the notes he had executed to them for the rented land, and, being unable to make any satisfactory arrangement with Mays, Devers brought this suit against Martin and Drain and the children of May to recover the value of the fence built and the wheat sown, and damages for being deprived of the use of the leased premises. Before the case was submitted to the jury Devers dismissed so much of the action as sought to recover against the Mays, but prosecuted the action against Martin and Drain, obtaining judgment against them for $161.50 on account of the fence and wheat, being limited to these items by instructions of the court. After this judgment

Digitized by Google

was rendered Devers brought a separate suit against the Mays, seeking to recover from them the value of three-fifths of the wheat harvested from the ground that he had sowed, alleging its value to be about $345. To this pleading, demurrers, and motions to strike out were filed, resulting finally in the dismissal of the action. From this judgment Devers appeals, and also prosecutes an appeal from the judgment in the case of Martin and Drain, alleging that the court committed error, to his prejudice, in rejecting evidence and misinstructing the jury.

We will first dispose of the questions raised in the case against Martin and Drain. During the trial of the case Devers offered to prove that the farm in October, 1903, and from that time until March 1, 1904, was worth at least $500 more money for the uses for which he had rented it than the price he agreed to pay for it. This evidence, on motion of Martin and Drain, was excluded from the jury, and the only testimony admitted was concerning the value of the fence built and the expense Devers was put to in purchasing and sowing the wheat. Devers also asked the court to instruct the jury in substance that if Martin and Drain refused to deliver possession of the leased premises to him on or before March 1, 1904, and to keep him in possession of said farm for the year ending March 1, 1905, they should find for him such sum in damages as he sustained thereby, not exceeding the amount claimed in the petition; and further asked the court to say that the measure of damages recoverable was the increased value of the lease, if any, above the amount that he had agreed to pay for it. The contract between the parties obligated Martin and Drain unconditionally to put and keep Devers in possession of the leased premises, and there is no provision in it relieving them from their obliga-

Digitized by Google

tion in the event May should die before the termination of the lease. Although they alleged in their answer that it was distinctly understood at the time the contract was entered into that they only owned the life estate of May in the land, and that, if the death of May occurred before the termination of the tenancy, all right and control in the land on their part ceased, and Devers from that time must look to the Mays as his landlords, and for possession and control of the land, but that by mistake and inadvertence these conditions were omitted from the contract. There was also evidence introduced tending to sustain this contention of Martin and Drain. On the other hand, Devers denied that any condition or agreement of this kind was mentioned or omitted from the contract. It was also pleaded that Devers was not to erect the fence until his tenancy began, but neither of these issues were submitted to the jury.

The only question presented on this appeal for our consideration as between Devers and Martin and Drain is: Was Devers under the contract (assuming that there was no mistake in its execution) entitled to damages on account of the failure of Martin and Drain to place and keep him in possession of the leased premises during the terms mentioned in the contract? And, if so, what is the measure of damages he is entitled to? This question must be considered as settled in this State by the opinion in Smith v. Phillips, 29 S. W. 358, 16 Ky. Law Rep. 615. In that case in November, 1892, Smith rented a tract of land from Phillips for the year beginning January 1, 1893. Phillips refused to place Smith in possession of the premises, and Smith brought an action in damages against him; and this court said that: "On the failure or refusal of the lessor to give possession of the premises, a rule which would allow the lessee to re-

Digitized by Google

cover as damages the difference between the amount he agreed to pay and the value of the lease on the day possession was to be given would be a simple and certain method of ascertainment of damages. * * * We think the rule should be to allow the lessee to recover the actual damages which approximately flow from the breach. However, if a lessee desires to do so, he may waive any claim he might have for any special damages, and recover the difference between the contract price and the value of the lease on the day possession should have been given under the contract." The court also held that this rule as to the measure of damages was not to be inexorably applied in all cases, and that a state of facts might be presented that would authorize a lessee to recover special damages, as where there was no difference between the rental value of the property and the price agreed to be paid for it, but the lessee had incured expense and sustained damage in preparing and removing to the premises and in other respects. Kelly v. Davis, 9 Ky. Law Rep. 647. We consider the law correctly laid down in these cases. It is in harmony with the prevailing rule on the subject, as can be seen by an examination of Sutherland on Damages, section 864; Sedgwick on Damages, section 1022; Jonas v. Noel (Tenn.), 39 S. W. 724, 36 L. R. A. 862; Cohn v. Norton (Conn.), 18 Alt. 595, 5 L. R. A. 572. We therefore again declare that when a valid contract for the lease of a farm is entered into, and the lessor refuses to place and keep the lessee in possession according to the terms of the lease, the measure of damages the lessee is entitled to recover for the breach of contract is the difference between the price he agreed to pay and the actual rental value of the property; and, the facts authorizing it, the lessee in the same action may recover such special

Digitized by Google

damages as he has sustained. Nor is it necessary to entitle the lessee to recover general or special damages that he should allege or prove any effort upon his part to rent other land, or to engage in other occupations, because the recovery is not sought on account of loss of time or services, but as damages for the breach of a distinct contract for the use and possession of specific property. It follows that the court erred in rejecting the evidence offered by Devers showing the difference between the contract price and the rental value of the land, and in failing to instruct the jury upon this issue. If there was a mistake in the contract, or if it was entered into with the understanding and agreement upon the part of Devers that Martin and Drain only owned the life estate, and that their interest in and control over the property ceased with the death of Mr. May, and thereafter Devers must look entirely to the Mays for protection—questions we do not, of course, determine —the rights of the parties should be adjudged accordingly, and the contract reformed to express the true agreement between the parties.

In respect to the case of appellant against the Mays to recover the value of a portion of the wheat sown by him and harvested by them, we are of opinion that the trial judge correctly ruled that appellant was not entitled to recover. Under the common law it is said in Blackstone, book 2, p. 121, that: "A tenant for life, or his representative, shall not be prejudiced by any sudden determination of his estate because such a determination is contingent and uncertain. Therefore, if a tenant for his own life sows the land and died before harvest, his executor shall have the emblements or profits of the crop, if the estate was terminated by the act of God. The representative therefore, of a tenant for life shall have

Digitized by Google

the emblements to compensate for the labor and expense of tilling, manuring and sowing the lands." And emblements, on the authority of the same book, embraced "not only corn sown, but roots planted, or other annual artificial crops." And so, in Taylor on Landlord & Tenant, sec. 534, it is laid down that: "A tenant for life, or his legal representatives and undertenants, as well as a tenant for year to year or at will, is entitled to emblements, which means that he may take and carry away within a reasonable time after his tenancy has ended such annual productions of the soil as are raised by his labor, as corn, hops, flax, and the like, * * * and the general rule is that, if the term is so uncertain that the tenant at the time he sows his crop cannot know that his tenancy will continue until he shall have reaped it, he will be entitled to the crop as emblements." But this rule of common law has been changed by statute, and is not in force in this State except to the extent allowed by the Kentucky Statutes of 1903, which provides, in section 3862, that "all the emblements of the lands of a person dying after the first day of March which shall be severed before the last day of December following shall be assets in the hands of his personal representative." And in section 3863 that: "All the emblements growing on the lands on the last named day, or at his death, if that shall happen before the last day of December, and before the first day of March, shall pass with the land to the heir, devisee, reversioner or remainderman." These two sections are to be read together. In fact, in the Revised Statutes they were embraced in one section; the language being identical with that found in the two sections in the present statute. Under this statute the personal representative of a person who dies after the 1st day of March is entitled to all the emble-

Digitized by Google

ments which shall be severed before the last day of December following, but the emblements growing on the land on the last-named day, or at the death of the tenant, if he dies between the last day of December and the 1st day of March, shall pass with the land to the heir, devisee, reversioner or remainderman. It will thus be seen that Devers, who may be said to have occupied the same relation towards the land as the life tenant May, was not entitled to an interest in the wheat as emblements, because, although May died after the 1st day of March, the wheat could not be severed from the land "before the last day of December following," and, as the emblements were growing on the land on the last day of December. they passed with the land to the remainderman.

Wherefore the judgment of the lower court in the case of Devers v. Charles B. May, etc., is affirmed, and the judgment in the case of B. F. Devers v. M. D. Martin, etc., is reversed, with directions for a new trial in conformity with this opinion.

Digitized by Google

CASE 49.—ACTION ON TWO PROMISSORY NOTES BY MARGARET W. ROBERTSON AND OTHERS AGAINST B. B. BEMISS AND OTHERS.—January 22.

Bemiss, &c., v. Robertson, &c.

Appeal from Warren Circuit Court.

JOHN M. GALLOWAY, Circuit Judge.

From the judgment both parties appeal. Affirmed on the original and reversed on the cross appeal.

Principal and Agent—Investing Money—When Agency Ceases—Liability of Principal.—Bemiss, &c., executed bonds for land sold at decretal sale, which Potter signed as surety, on which the surety paid certain sums for which Bemiss, &c., executed their notes to Potter as agent, which he assigned to Mrs. Robertson who was a depositor in the bank of Potter, and who had authorized Potter to invest her money on deposit. in good securities. Checks were drawn on Mrs. Robertson for the amount of the two notes and credited to the account of Potter, (who was cashier of the bank) and who gave his individual check to the commissioner for the amount. Held, that Potter was the agent of Mrs. Robertson to invest her money, but his agency ceased when he took the notes of Bemiss, &c., and transferred the amount of them from her account to his.

W. B. GAINS, attorney for appellant.

POINTS AND AUTHORITIES.

1. All errors that may have been committed by the court below, except as to the right of set-off, are specifically and expressly waived by appellant.

2. A note executed prior to the Negotiable Instrument act of 1904, is subject to all defenses.

3. The original obligee, being the holder, failure of consideration is a good defense.

Digitized by Google

4. Payment to Potter, when the contract was for payment to Rodes is a failure of consideration.

5. The note executed prior to the passage of the act is subject to be credited by the amounts held by the original obligee, before notice of assignment, as against the assignee, for a valuable consideration without notice. (Section 474, Kentucky Statutes.)

6. The principal is chargeable with the knowledge of the agent, the appellee was not holder in due course because she took with notice of the infirmity. (Article 4, section 4, Negotiable Instrument Act; Richie v. Cralle, &c., 22 Ky. Law Rep., 160.)

C. U. McELROY, attorney for Mrs. Robertson.

To epitomize and compress the whole issue and argument into a "nut shell," I respectfully and earnestly insist,

1st. J. E. Potter was only appellee's agent to invest the amount of the notes in suit in those notes, and, when that was done his agency for her, ended absolutely and finally.

2nd. J. E. Potter was the agent of the appellants to raise the money to pay off the sale bond, was their agent to pay off the bonds, was their agent to conduct the whole transaction from "end to end."

3rd. The minute this money came into Potter's hands, in law it came into appellant's hands, and the title to the money passed at once from appellee to appellants, and so remains to this day.

4th. As a necessary and inevitable sequence, as appellants got all the money their notes called for, there was of course, no failure of consideration of the notes executed by appellants.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER.

On September 28, 1903, the appellants purchased at decretal sale a tract of land in Warren county, and executed to the master commisisoner two bonds for the purchase money, of $4,000 each, due, respectively, on the 28th day of March, 1904, and on the 28th day of September, 1904. J. E. Potter became the surety in both the bonds. When the first bond fell due, the surety, Potter, paid to the commissioner $1,942.51, the amount necessary to pay the heirs who did not purchase the land, their interest in the proceeds, and

Digitized by Google

appellants executed to Potter their note for this amount payable to him "as agent." $630.95 of this fund was due to some of the infant heirs, and their guardians refused to accept the money due them, as under the terms of sale he was not required to receive it at that time; and thereupon the commissioner paid back to Potter the sum due the infants. When the bond payable in September, 1904, became due, Potter also paid to the commissioner $1,733.05, the amount necessary to satisfy it, less $835.65 due the infants, which was retained by Potter; the guardian refusing to receive it. On the date of the payment to the commissioner, appellants executed to Potter as agent their note for $1,733.05. In 1906 the appellee Mrs. Robertson, to whom the notes had been assigned by Potter, brought suit on them. The appellants resisted the collection of $630.95 on the first note, and $835.65 on the second note. Upon the pleadings and evidence the case was submitted to the chancellor, who allowed appellants credit by the $630.95, but refused to give them credit for the $835.65. From this judgment, both parties appeal.

The evidence presented, in substance, the following state of facts: J. E. Potter was a banker in Bowling Green, and when the bonds and notes were executed was considered by every person to be a man of wealth. Among the depositors in his bank was the appellee Mrs. Robertson, who had authorized Potter to invest her money on deposit in his bank in good securities. Checks were drawn on her account for the amount of the two notes executed by appellants, and the same was credited to the account of Potter, who gave his individual check to the commissioner for the amount paid him, and retained as a part of his account the amount due the infants, the account being marked to show that it was the "Bemiss account," and the notes

Digitized by Google

executed by appellants payable to Potter as agent were really owned by Mrs. Robertson, as Potter as agent had simply loaned her money to appellants. Some time after this, and while the money due the infants was in the bank to the credit of Potter, the bank failed. The result of the failure was that the land purchased by appellant was charged with the amount due the infants, as it had never been paid them, and the bonds to this extent were unsatisfied. In their defense to the suit on the notes, appellants set up that there was a failure of consideration to this extent. The evidence discloses that, previous to the execution of the bonds, appellants had made arrangements with Potter to not only become their surety, but to raise the money to pay the bonds when they fell due. Aside from the fact that they signed the notes sued on, appellants took no part in securing the money, and knew little, if anything, about whose money it was, or how it was obtained, trusting the entire matter to Potter. At the time the notes were executed, Mrs. Robertson was absent from the State, and knew nothing of the transaction until the notes were assigned her.

It is the contention of appellants that, in advancing the money, Potter was acting as the agent of Mrs. Robertson, and the transaction must be treated as if conducted by her individually, and, therefore, as she retained and never paid on or for the notes the amount due the infants, they should be credited by these sums; or, if this position is not tenable, that Mrs. Robertson was the assignee of Potter, and therefore in no better position than Potter, would have been if he had attempted to collect the notes, as appellants could assert any defense against Mrs. Robertson, assignee, that they could against Potter, the assignor. For the appellee it is said that, under

Digitized by Google

the arrangement and understanding between appellants and Potter, he was to look after the payment of the bonds raising the money for that purpose, and therefore was at all times their agent, and, although he may have advanced the money of Mrs. Robertson as her agent, yet his agency for her ceased when the money obtained from her was credited to his account, and that, after the money was so credited, he held it as the agent of appellants, and the loss sustained must be suffered by them.

This is one of the hard cases that the mistakes or misfortunes of people make it necessary for the courts to decide. A judgment in favor of either party will result in loss to an innocent person. But, as in all cases of this character, where a loss must fall upon one of two persons, the burden must be borne by that one whose confidence or mistake was the proximate cause of it. There is no doubt that in lending the money and taking the notes Potter was acting as the agent of appellee. It is also undenied that it was the understanding of appellants with Potter when he signed the bonds that he should furnish or raise the money with which to pay them, and in obtaining money for this purpose he was acting as the agent of appellants. The principal question therefore is, when did his agency for Mrs. Robertson cease? We are of the opinion that it terminated when he took the notes and transferred the amount of them from her account to his. That ended his connection with the transaction so far as she was concerned. After that time Mrs. Robertson had no interest in the matter. Unquestionably the money was received by Potter as the agent of appellants. The mere circumstance that the transaction only involved the transfer of money from one account to

Digitized by Google

another cannot affect the question. The result was the same as if Mrs. Robertson had paid to Potter in cash the amount of the notes, and Potter had placed the cash to his credit in the bank. It cannot be maintained that in paying the bonds or in receiving the money for that purpose Potter was acting as the agent of Mrs. Robertson. Appellants intrusted Potter with authority to obtain the money for them. They executed notes to him as agent, and the money received on the notes, although placed to his account, was designated as the "Bemiss account," and was held by him as agent for appellants. The assignment of the notes by Potter to Mrs. Robertson does not enter into the case. They were really her notes when taken by Potter, her agent.

The case of Ritchie v. Cralle, 108 Ky., 483, 56 S. W., 963, 22 Ky. Law Rep., 160, is not applicable to the facts of this record. In that case no question of agency was made or discussed. In the case at bar the pivotal point is one of agency.

Having reached the conclusion that Potter was solely the agent of appellants the moment the money was paid to him by Mrs. Robertson, it necessarily follows that the whole loss must fall upon the appellants.

Wherefore the judgment is affirmed on the original, and reversed on the cross appeal, with directions to proceed in conformity with this opinion.

Petition for rehearing by plaintiff overruled.

Digitized by Google

CASE 50.—ACTION BY MERCHANTS' NATIONAL BANK OF LAFAYETTE, IND., AGAINST W. P. FORD, IN WHICH DEFENDANT FILED A CROSS PETITION AGAINST CROUCH & SON CLAIMING DAMAGES FOR FRAUD IN THE SALE OF A STALLION.—January 23

Merchants' National Bank v. Ford

Appeal from Owen Circuit Court.

JOHN D. CARROLL, Special Judge.

From the judgment for Ford, plaintiff and Crouch & Son appeal. Affirmed.

1. Appeal—Review—Damages—Excessive—Breach of Contract.—Under the rule that a verdict awarding damages will not be disturbed, as being excessive, unless it is palpably against the evidence, so as to strike the mind at first blush as being the result of passion or prejudice, a verdict for $1,600 damages for breach of a warranty that all colts of a stallion, sold for $1,800, would be black, brown, or bay in color; that he was free from all defects and that he would produce colts from 75 per cent. of all mares bred to him; and for the breach of an agreement not to sell any stallion of the same breed within 20 miles of the buyer's residence—was not excessive.
2. Appeal—Reservation of Grounds for Review—Motion for New Trial.—Instructions not relied on as a ground for new trial will not be considered on appeal.
3. Same—Objections to Pleadings—Name of Defendant.—Where a cross-petition was filed against "J. C. and ——— C., partners, doing business under the firm name of J. C. & Son." and they entered appearance and answered without exception, complaint cannot be made on appeal because the son's name was not given in the pleadings.
4. Constitutional Law—Privileges and Immunities—Corporations.—A corporation is not a "citizen" within the meaning of Const. U. S., art. 4, sec. 2, providing that the citizens of each

Digitized by Google

state shall be entitled to all the privileges and immunities of citizens of the several states, nor within the meaning of 14th Amend., sec. 1, providing that no state shall abridge the privileges and immunities of citizens of the United States.

5. Same—Equal Protection of the Laws—Corporations.—A foreign corporation not subject to process issuing from the courts of the State is not within its jurisdiction within the meaning of Const. U. S., 14th Amend. sec. 1, providing that no state shall deny to any person within its jurisdiction the equal protection of its laws.

6. Same.—A nonresident corporation cannot demand rights which are accorded not to the citizens of the State, but only to resident incorporated banks.

7. Banks and Banking—National Banks—Right to Regulate.—Ky. Stats., 1903, sec. 483, placing notes payable and negotiable at banks organized in the State under the State and federal laws, and indorsed to, or discounted by, any such bank on the same footing as foreign bills of exchange, violates no rights secured to national banks by acts of Congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit.

CLORE, DICKINSON & CLAYTON and J. H. SETTLE, for appellants.

CAMMACK & PERRY, J. G. VALLINGHAM and H. G. BOTTS, for appellees.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

On January 5, 1903, J. Crouch & Son sold to W. P. Ford a Norman Coach Stallion for $1,800, to be paid in three installments of $600 each, for which Ford executed notes payable at the Citizens' Bank at New Liberty, Ky. The first note fell due on October 1, 1904. In September, 1904, Crouch & Son assigned the first note to the Merchants' National Bank of Lafayette, Ind. Ford declined to pay the note when due, and the bank brought this suit against him. Ford filed an answer in which he pleaded as a counter-

Digitized by Google

claim that at the time of the sale of the stallion to him no other stallion of that breed was kept in the county, and as an inducement to purchase Crouch & Son obligated themselves that they would not place or sell to any one who would place a stallion of the same breed within 20 miles of his residence; that they also warranted that the breeding and pedigree of the stallion were such that all colts sired by him would be black, brown, or bay in color, and that he would get colts from 75 per cent. of all mares bred to him: that they warranted that the horse was sound and free from all defects. He further alleged that Crouch & Son, immediately after the sale of the stallion to them, sold another stallion of the same breed to D. D. Foree to be stood within five miles of his residence; that the colts sired by the stallion sold to them were not all black, brown, or bay in color; that the horse was not sound and all right, but was a cribber or stump sucker, and that he only got colts by 56 per cent. of the mares bred to him; by reason of all of which he alleged that he had been damaged in the sum of $2,000, which he pleaded as a counterclaim against the note, making his answer a cross-petition against J. Crouch and ———Crouch, partners, doing business under the firm name of "J. Crouch & Son." He prayed that the plaintiffs' petition be dismissed, and for judgment over against Crouch & Son. The plaintiff demurred to the answer. Its demurrer was overruled. Crouch & Son filed an answer to the cross-petition, denying its allegations. The case was tried by a jury. There was evidence on the trial by the defendant sustaining the defense set out in his answer, and there was evidence by the plaintiffs contradictory of the defense. The court instructed the jury in substance that, if the horse was warranted as alleged in the defendant's

Digitized by Google

answer, and the warranty had been broken, they should find for the defendant the damages he had sustained, and should set off the damages against the note, finding a verdict for the plaintiff for the balance of the note, if the damages did not equal the note, and finding against Crouch & Son, if the damages exceeded the note, the amount of the excess of damages over the amount of the note. The jury, under these instructions, found for the defendant Ford against Crouch & Son in the sum of $1,000, on which the court entered judgment dismissing plaintiffs' petition and adjudging that Ford recover of Crouch & Son $1,000. From this judgment, Crouch & Son and the bank appeal.

When the verdict of the jury is read in connection with the instructions of the court, it is evident that the jury fixed the entire damage to Ford by reason of the breach of warranty at the amount of the note plus $1,000, which would make the amount of the damage as found by the jury in round numbers something over $1,600. It is insisted that the verdict is palpably excessive under the evidence, and should be set aside for this reason. There is little doubt under the evidence that the horse was a cribber or stump sucker, and it is reasonably clear from the evidence that if this had been known to Ford, he would not have bought him at all; that such a defect, while it does not destroy the procreative power of the horse, renders him practically valueless as a stallion, for the reason that persons having mares are unwilling to breed them to a horse that is a cribber, and that it is almost impossible to keep such a horse in good order. Cribbing seems to be a habit acquired by a horse when a colt, and as Crouch & Son raised the horse they could not well have been ignorant of this defect. The proof also shows clearly that the horse

Digitized by Google

did not get colts by 75 per cent. of the mares bred to him, and that the colts he got were not all black, brown or bay. The evidence is undisputed that Crouch & Son sold another stallion which was stood at Sparta, about six miles from Ford's residence, which got a large amount of custom which he counted on. A jury of practical men are peculiarly qualified to pass on the amount of damage which would be sustained by the breach of a warranty in matters of this sort. They have practical knowledge of the effect of the matters proved and to what extent they would affect the value of a stallion. There was much evidence before the jury which fully warranted their finding, and, while the evidence was conflicting, the rule is that the verdict of the jury will not be disturbed unless it is palpably against the evidence, so as to strike the mind at first blush as the result of passion or prejudice. In view of the proof in the case, we cannot say that there is anything in the verdict to indicate passion or prejudice. If the jury credited the proof for the defendant, their verdict was not unwarranted, and the credibility of the witnesses is peculiarly for the jury. It is true, a letter of Ford's written in September, 1904, was silent as to some of the matters as to which he complained in the action, and that he did not then claim damages for anything near the amount that he did finally. It is also said that it is utterly incredible that a man selling a stallion would guaranty the color of his colts, as this would depend to some extent upon the color of the mare; but the incredibility of the defendant's version of the contract, and the fact that he had not in his letter claimed all the damages that he did when sued, went simply to the credibility of the witness, and was for the jury. It may be that what the parties meant was that the horse would sire black,

Digitized by Google

brown, or bay colts where the color of the colt was not due to the color of the mare. In other words, it is probable that they meant when they agreed that he would sire black, brown or bay colts, that this would be the color of the colts in so far as they got their color from him. But, however this may be, the jury were especially qualified to pass upon such a question. The contract was made between two horsemen, and a jury of farmers would not be easily misled on such a question.

Complaint is made of the instructions of the court to the jury, but this was not relied on in the grounds for new trial in the circuit court, and cannot be considered here.

The name of the son who was a partner with his father should have been given in the pleadings, but the answer to the cross-petition was filed without exception, and, no objection having been made in the circuit court on this ground, it cannot be urged here. When Crouch & Son, filed their answer to the cross-petition without objection, all question as to the right of the defendant to assert his claim on the warranty in this action was waived. The case of Wells v. Boyd, 1 Duv., 366, has no application, because Crouch & Son here appeared without objection and took issue on the cross-petition. A litigant is not allowed to enter his appearance without objection, and, after taking his chance of getting a verdict, to raise the question that he could not properly be sued in that way when he is defeated in the action.

The contract was made before the present negotiable instruments act was passed, and is governed by the law in force at the time the contract was made. Section 483, Ky. Stats., 1903, is in these words: "Promissory notes payable to any person or to a corporation, and payable and negotiable at any bank

Digitized by Google

incorporated under any law of this commonwealth, or organized in this commonwealth under any law of the United States, which shall be endorsed to, and discounted by, the bank at which the same is payable, or by any other of the banks of this commonwealth, as above specified, shall, be, and they are hereby, placed on the same footing as foreign bills of exchange." The note was payable at an incorporated bank in this State. It was discounted by a national bank in Indiana, and not by a bank in this State. It is insisted that national banks are all on an equality, and that they are entitled to all the privileges of the most favored banks organized under the laws of the State. If the note had been discounted by an incorporated bank in this State it would, under the statute, have been put on the footing of a bill of exchange, and it is insisted that, in so far as the statute denies this privilege to a national bank in another state, it is in conflict with the federal statute. The contrary was held in Richmond Nat. Bk. v. Coons, 8 Ky. Law Rep. 159, and Monarch v. First Nat. Bk., 105 Ky. 336, 49 S. W. 32, 20 Ky. Law Rep. 1788. See, also, 21 Am. and Eng. Ency. of Law, 328; Thomas v. Farmer's Bank, 46 Md., 43; Hawley v. Hurd, 72 Vt., 122, 52 L. R. A., 195, 82 Am. St. Rep., 922; State v. First National Bank, 2 S. D., 568, 51 N. W., 587.

Article 4, section 2, of the United States Constitution, provides that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states. But corporations are not citizens within the meaning of this provision. Paul v. Virginia, 8 Wall., 168, 19 L. Ed., 357. Section 1 of the fourteenth amendment provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, but a corporation is not a citizen within the

Digitized by Google

meaning of this provision. Orient Insurance Company v. Daggs, 172 U. S., 557, 19 Sup. Ct., 281, 43 L. Ed., 552. This section also provides that no state shall deny to any person within its jurisdiction the equal protection of its laws, but this provision relates only to persons within its jurisdiction. A foreign corporation which is not subject to process issuing from the courts of the State is not within its jurisdiction. Blake v. McClung, 172 U. S., 239, 19 Sup. Ct., 165, 43 L. Ed., 432. As regards the construction of contracts, the transfer of property, the collection of debts, and the liability to suit, national banks are subject to the control of the state where they are situated. First National Bank v. Kentucky, 76 U. S., 353, 19 L. Ed., 701. A nonresident corporation cannot demand rights which are accorded not to the citizens of the State, but only to incorporated banks resident in the State.

Section 478, Ky. Stats., 1903, violates no rights secured to national banks by the acts of Congress. It defines what shall be considered commercial paper in the State. All persons who deal in notes executed in this State, no matter where they reside, take them subject to the laws of the State. The purpose of the statute is that paper discounted as provided by it shall pass from hand to hand, and thus augment the volume of circulating medium in the State. The indorsers are liable to subsequent holders, and the purpose of the statute would be entirely defeated if an indorsement to a nonresident of the State, who could not be reached in the courts of this State, was held to be sufficient under it. The statute is not primarily for the benefit of the banks, but for the benefit of the people of the State. The State has the power to declare what paper may be assignable,

Digitized by Google

and what defenses may be made against the paper in the hands of the assignee.

Judgment affirmed.

CASE 51.—ACTION BY W. E. MITCHELL, ADMINISTRATOR OF THE ESTATE OF E. L. MITCHELL AGAINST HUGH BRADY AND OTHERS FOR DAMAGES FOR THE DEATH OF PLAINTIFF'S INTESTATE.—January 23.

Mitchell v. Brady, &c.

Appeal from Jefferson Circuit Court; Common Pleas Branch (Second Division).

J. C. DODD, Special Judge.

From the judgment dismissing his petition plaintiff appeals. Affirmed as to the City of Louisville. Reversed as to the other defendants.

1. Municipal Corporations—Defects in Streets—Falling Objects. —Plaintiff's intestate was killed by the falling of an iron water pipe constructed on the side of a building which abutted upon the sidewalk. There was no evidence tending to show notice on the part of the city of the defective and dangerous condition of the pipe. Held, that the city was not liable for damages by reason of the death of plaintiff's intestate.
2. Landlord and Tenant—Condition of Premises—Injuries from Falling Objects.—Where an iron water pipe constructed on the side of a building which abutted upon the sidewalk falls by reason of the fastenings of the pipe getting out of repair and pulling out of the wall, the tenant in possession is liable for the death of a person struck by the pipe while rightfully upon the walk.
3. Same.—Where an iron water pipe constructed on the side of a building which abutted upon the sidewalks falls by reason of the fastenings of the pipe getting out of repair and pulling

Digitized by Google

out of the wall the owner of the building is liable for the death of a person struck by the pipe while rightfully on the walk, though the building is leased to another and the tenant had obligated himself to keep the property in repair.

4. Witnesses—Competency—Testimony by Wife for Husband—Joint Interest.—Ky. Civil Code, sec. 606, provides that neither husband or wife, while the marriage exists, shall testify against the other or concerning any communication between them during the marriage, nor shall either of them testify for the other except in certain cases, and except in actions which might have been brought by or against the wife had she been unmarried. A husband, as administrator of the son, brought an action for damages for his wrongful death, the recovery in such a case, if there was one, belonging equally to the father and mother. Held, that the wife was a competent witness for plaintiff.

WILLIAM FURLONG, attorney for appellant United Laundry Company.

POINT DISCUSSED AND AUTHORITY CITED.

The landlord having surrendered possession of the leased premises and having no control over the premises where the accident occurred, is not liable in damages because of the defective condition of the premises. This is especially true in the case where the injured party is a sub-tenant to whom the landlord is not under contract, and to whom the landlord is under no obligations. (Franklin v. Tracy, 24 Ky. Law Rep., 1409.)

BENNETT H. YOUNG and MARION W. RIPY, attorneys for appellant.

The identical questions presented here, so far as we have been able to ascertain have never been passed on by this court and we are urging their consideration upon the court because we feel that appellant is entitled to have a jury decide the issues in this case.

AUTHORITIES CITED.

Spearman & Redfield on Negligence (5th Ed.) sec. 710; Thompson on Negligence, vol. 1, sec. 1138 and 1144; Franklin v. Tracy, 25 Ky. Law Rep., 1409; Miles v. Tracy, 28 Ky. Law Rep., 621; Jaggard on Torts, vol. 2, p. 868; Civil Code, sec. 606; Commonwealth v. Sapp, 90 Ky., 580; Babcock v. Booth, 2 Hill, 181.

Digitized by Google

OPINION OF THE COURT BY JUDGE HOBSON.

Hugh Brady is the owner of a brick building located on the northeast corner of Sixth and Broadway streets in Louisville. He rented the building to the United Laundry Company, which used part of the lower floor as an office and sublet the remainder of the building to Mrs. Mary Donnelley, who in turn sublet two rooms to W. E. Mitchell, in which he lived with his family. Attached to the building there was a tin down pipe to take the water from the roof. The down pipe extended down the wall of the house on the Sixth street side and about five feet above the sidewalk it entered an iron down spout, the lower end of which rested on a metal gutter which extended across the sidewalk through which the water was conveyed to the sewer. The iron pipe was about five feet long and something like six inches in diameter, half round in shape, the flat side being placed against the side of the house which abuts immediately upon the sidewalk. The iron pipe weighed about 80 pounds. On June 3, 1903, Mitchell's little son three year old, was on the sidewalk in charge of his mother who was near by, when the iron pipe, without warning, fell down, striking the child upon the head and killing him almost instantly. W. E. Mitchell qualified as the administrator of the child, and brought this action to recover for his death against Hugh Brady, the owner of the property, the United Laundry Company, who leased it from him, and the City of Louisville, charging that the iron spout was permitted to become and remain in a dangerous condition, and that this was known, or could have been known to the defendants by ordinary care on their part; that the sidewalk was in a dangerous con-

Digitized by Google

dition from the iron spout overhanging it without being properly secured, and that this dangerous condition had negligently been allowed to continue for a long time. The defendants filed answers controverting the allegations of the petition, and the case was heard by a jury. At the conclusion of the plaintiff's evidence the court peremptorily instructed the jury to find for the defendants, and, the plaintiff's petition having been dismissed, he appeals.

The proof heard on the trial established without doubt the facts above stated. It also showed that the only fastening securing the iron pipe in position was a wire at the top which was wrapped around a nail on either side; that the wire had become rusted and the mortar had been washed out so that the nail on one side had nothing to hold it and had come out, allowing the pipe to fall and strike the child, who happened to be just then near by on the pavement. In the contract between Brady and the laundry company, the property was leased by him to it for five years and it was obligated to keep the premises in repair and not to permit any part of it to become unsafe or dangerous. There was no evidence tending to show notice on the part of the city of the dangerous condition of the spout, and, as the danger came from the defective condition of the house and not from any defect in the sidewalk, the peremptory instruction as to the city seems to have been proper, but as to the other defendants, a different rule applies. In Shearman & Redfield on Negligence, sec. 347, the rule is thus stated: "It is therefore, the settled doctrine on this subject that, if an abutting owner makes an excavation upon his land adjacent to, or near a highway, and leaves it unprotected, he is liable to a traveler on the highway, who, while using ordinary care, falls into it and is injured. So, if he erects a

Digitized by Google

building upon or near a street, he is under a legal obligation to take ordinary, reasonable care that it shall not fall into the street and injure persons lawfully there, and a ruinous wall or other structure likely to fall is a nuisance, and, if the structure falls into the street and injures a passer-by after a reasonable time to repair or remove it has elapsed, the owner is liable to the injured person." The same rule is laid down in 1 Thompson on Negligence, sec. 1213, in these words: "If the owner of a house has constructed it in so faulty a manner, or suffered it to get out of repair, so as to endanger persons passing along the street, it becomes a nuisance, and, on familiar grounds, he is liable to any person sustaining special damage thereby." The rule has been applied in many cases, as, for instance, where the defendant erected a lamp over the sidewalk, which was permitted to get out of repair through general decay, but not to the knowledge of the defendant. Tarry v. Ashton, 1 Q. D. Div., 314. The rule was also applied to a swinging sign over the sidewalk blown down in a gale (Salisbury v. Herschenroder, 106 Mass., 458, 8 Am. Rep., 354); to a ladder on a narrow sidewalk set up against a building while the wind was blowing strong (Clarke v. Rhode Island Electric Company, 16 R. I., 463, 17 Atl., 59); to a brick falling from a bad wall (Mauerman v. Siemerts, 71 Mo., 101; Murray v. McShane (Md.) 36 Am. Rep., 367). In the case last cited the plaintiff, while passing by, sat on the sill of the door to tie his shoe, and while sitting there momentarily was struck by the fall of the brick. It was held that he was not a trespasser and might recover. In Weller v. McCormick (N. J. Law) 19 Atl., 1101, 8 L. R. A., 798, the same principal was applied to a tree planted on the owner's ground, and it was held that both the owner and the occu-

Digitized by Google

pant of the property were responsible| In St. Louis, &c., R. R. Co. v. Hopkins (Ark.) 15 S. W., 610, 12 L. R. A., 189, a large wooden sign fastened to the wall, 15 feet above the sidewalk fell from the blowing of the wind such as might be expected in the regular course of the season, and injured the plaintiff while he was on the sidewalk. The railroad company was held liable. In the note to this case other cases are collected.

From these authorities, both the owner of the property, Brady, and the laundry company who rented from him and had control of it, are prima facie responsible for the injury to the intestate under the proof; that is, the plaintiff made out a prima facie case against them. The owner of a building erected over the sidewalk is not absolved from liability to a person injured by the fall of a part of the building on the sidewalk, by reason of the fact that he has leased the property to another and the tenant has obligated himself to keep the property in repair. Both the tenant and the owner in such a state of case are responsible. It is incumbent upon the owner to keep his premises safe, and he cannot relieve himself of this liability by contract with his tenant. It is entirely immaterial that W. E. Mitchell lived in the building, or that Mrs. Donnelley rented to him a part of the building, with or without the consent of the laundry company. The injury was not received in the building. The fact that Mitchell lived in the building had nothing to do with the injury. The child was lawfully on the sidewalk where it had a right to be without regard to where its father lived.

Mitchell himself was not at home at the time his child was killed. He offered on the trial to introduce as a witness on his behalf his wife, who was with the child at the time. The circuit court declined

Digitized by Google

to allow her to testify, under section 606, Civil Code. While the administrator is the only plaintiff in the action, the recovery in a case like this belongs to father and mother equally. It has been held that in such actions the distributees of the estate testify for themselves within the meaning of section 606. The wife has an interest in the action and should be allowed to testify for herself. Mannion v. Lambert, 10 Bush, 295; Hopkins v. Faeber, 86 Ky., 223, 9 Ky. Law Rep., 550, 5 S. W., 749. The precise question before us was presented in Board of Internal Improvements v. Moore's Administrator, 23 Ky. Law Rep., 1885, 66 S. W., 417. It was there held that the wife was a competent witness. In that case the court, among other things said: "The husband is acting in a fiducial capacity, and prosecuting the action for the benefit of himself and wife. The wife is a competent witness in this case the same as if she would have been had the action been brought by herself and husband. Her relation to the subject of the controversy is exactly the same as it would have been had some other than her husband qualified as personal representative. From the nature of the case, the interest of the husband and wife cannot be severed in the prosecution and recovery in the action. It cannot be that the Legislature meant to exclude the wife as a competent witness in her own behalf simply because the husband has a joint and equal interest in the recovery. To so hold would do violence to the language and spirit of the section which authorizes a married woman to testify for herself."

We rest our judgment on this ground. There is no limitation in section 606 upon the right of the wife to testify for herself, except that she may not testify against her husband or concerning any com-

Digitized by Google

munication between them during marriage. There are limitations upon her right to testify for her husband, but where they are jointly interested there is nothing in the section to indicate that each may not testify for himself as any other litigant.

As to the city of Louisville the judgment is affirmed. As to the other appellees the judgment is reversed, and cause remanded for further proceedings consistent herewith.

CASE 52.—PROSECUTION AGAINST JOHN DIAMOND FOR STEALING CHICKENS OF THE VALUE OF MORE THAN $2.00.—January 24.

Diamond v. Commonwealth

Appeal from Garrard Circuit Court.

W. C. BELL, Circuit Judge.

Defendant convicted and appeals. Affirmed.

1. Stealing Chickens—Felony—Constitutionality.—An act of the General Assembly approved March 17, 1904, entitled "An act to regulate crime and fix the punishment thereof" and providing: "If any person shall steal chickens, turkeys, ducks, or other fowls, of the value of $2, or more, he shall be confined in the penitentiary not less than one nor more than five years," is not in violation of section 51 of the Constitution providing that "No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in its title.
2. Title to Act—Creating Crime—Prescribing Punishment—One Subject.—It is not essential to the validity of an act creating a felony that the title should describe the conditions under which it shall become effective; nor is it obnoxious for an act to create the crime and prescribe the punishment, as the matter of the description of the crime and the fixing

Digitized by Google

of the punishment are not two subjects. It is dealing with two features of the same subject, and both are germane to the title.

D. B. HERNDON, attorney for appellant.

(No brief in the record.)

N. B. HAYS, Attorney General, and C. H. MORRIS for appellee.

We submit:

The plain subject of the act is crime. The object is to prevent crime and to fix a punishment therefor. The subject and object of the act are both expressed in the title, and therefore cannot be in conflict of section 51 of the Constitution. (Acts 1904, page 83; Heyser v. Commonwealth, 25 Ky. Law Rep., 608; Conley v. Commonwealth, 98 Ky., 125; Weber v. Commonwealth, 24 Ky. Law Rep., 1727.)

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Affirming.

Appellant was indicted and convicted of a felony, charged with stealing chickens of the value of more than $2. The indictment was returned under the act of the General Assembly approved March 17, 1904, as follows:

"An act to regulate crime and fix the punishment therefor.

"Be it enacted by the General Assembly of the Commonwealth of Kentucky:

"1. If any person shall steal chickens, turkeys, ducks, or other fowls of the value of $2 or more, he shall be confined in the penitentiary not less than one nor more than five years."

Acts 1904, p. 83, c. 29.

Appellant complains of this act because he insists the title does not express its subject, and is therefore in contravention of section 51 of the Constitution, which reads:

Digitized by Google

"No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in the title."

The title of this act is the regulation of crime by the fixing of punishment therefor. It makes that a crime and a felony which was not previously a felony, and prescribes a punishment for it. It is not essential to the validity of an act creating a felony that the title should describe the conditions under which it shall become effective, nor is it obnoxious for an act to create the crime and prescribe the punishment, as the matter of the description of the crime and the fixing of the punishment are not two subjects. It is dealing with two features of the same subject. Both are germane to the title. Indeed, it is not possible to legislate on the subject otherwise. No penal statute could be effective that did not create the crime, if it was not one already existing at the common law, without at the same time prescribing the penalty for it. The statute in question does not, in our opinion, violate section 51 of the Constitution.

Judgment affirmed.

Digitized by Google

CASE 53.—ACTION BY MARY ESTEP AND OTHERS AGAINST A. J. ESTEP AND OTHERS TO VACATE A JUDGMENT.—January 24.

Estep, &c. v. Estep, &c.

Appeal from Magoffin Circuit Court.

D. W. GARDNER, Circuit Judge.

From a judgment sustaining a demurrer to the petition, plaintiffs appeal. Affirmed.

1. Appeal—Presumptions—Regularity of Proceedings.—Where, in an action to vacate a judgment, plaintiffs contended that in the original action an order of revivor after the death of the defendant therein was not made until more than a year after his death, and that no guardian ad litem was appointed for an infant defendant, held that, it appearing on appeal that the record in the original action was imperfect, and there being no affirmative showing to the contrary, it must be presumed that the order was made in proper time, and that all the heirs of the deceased defendant were of age when it was made.
2. Judgment—Vacation—Limitations.—One against whom a judgment has been procured by the fraud of the successful party may have it vacated on a proper showing, if the application is made within the 10 years allowed by Ky. Stats., 1903, section 2519.
3. Same—Action—Petition—Sufficiency.—In an action to set aside a judgment as obtained by fraud, mere allegations of the petition that the judgment was fraudulently and wrongfully procured, in that one of the attorneys for the unsuccessful party became interested for the other party and used his influence in procuring the judgment, was insufficient.

D. D. SUBLETT and C. W. NAPIER for appellants.

JOUETT, BYRD & JOUETT for appellees.

Digitized by Google

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

In 1906 the appellants brought this action to vacate a judgment rendered in 1896. The lower court sustained a demurrer to the petition, and the plaintiffs below, now appellants, declining to amend, their petition was dismissed, and they prosecute this appeal.

The judgment sought to be vacated was rendered in an action of E. L. Howard against Stephen Wheeler to recover the possession of a tract of land. The defendants answered, traversing the petition, and affirmatively averred that they were the owners of a certain boundary described on their answer. Pending this action, and in October, 1894, D. J. Wheeler filed his petition to be made a party, setting up that he was the purchaser of the land in controversy, and asked that his title be quieted and for other proper relief. In January, 1895, the petitioner Wheeler, who appears to have been made a party, filed a petition stating that the defendant Stephen Wheeler died 1894, leaving surviving him his widow and several children, naming them, one of whom was alleged to be an infant, but her age is not given. He asked that the suit be revived and prosecuted against the persons named as the real representatives of Stephen Wheeler, that summons issue against them, and a guardian ad litem be appointed to defend for the infant. The next order appearing in the record is: "By consent, this cause is revived against the real and personal representatives of Stephen Wheeler, deceased." This order is dated February, 1894, but evidently should be 1895, as the petition of D. J. Wheeler to be made a party was filed in October, 1894, and his petition asking that the action be

Digitized by Google

revived was filed in January, 1895. In October, 1895, the following order was made: "Came the attorney for the plaintiff and defendant, and by their consent it is ordered that this cause be transferred to the equity docket, and each party may file any other appropriate pleading, and this cause is continued." In February, 1896, the following order appears: "Came the plaintiff and filed reply to defendants' answer herein; also came the parties and filed the written agreement herein." This written agreement is not in the record, nor is there anything to indicate what it was. The record further shows that on the following day the cause was submitted and judgment rendered.

The orders and steps we have mentioned are taken from the record filed with the petition of appellant in this action. The grounds upon which they seek to have the judgment vacated are: That it was obtained by fraud; that summons on the petition seeking a revivor was not executed on the real representatives of Stephen J. Wheeler; that the order of revivor was not made until more than a year after the death of Stephen J. Wheeler; that the land described in the judgment is not the same as that mentioned and described in the petition; that no guardian ad litem was appointed for the infant. The petition further avers that the plaintiffs, appellants, are the heirs of Stephen J. Wheeler and entitled to the possession of the land. So far as the record discloses, all of the parties to the suit of Howard v. Stephen J. Wheeler were of age at the time of Stephen J. Wheeler's death, except one. The age of that one at his death does not appear. She may have been 10 years old, or 20 years and 9 months of age. The record of the old suit is imperfect, and it is apparent that all of it has not been made a part

Digitized by Google

of this action. In the condition that we find the record, we must presume that the order of revivor was made in proper time and by consent of the parties, and that all of the heirs of Stephen J. Wheeler were of age at the time it was made.

Our attention has not been directed by counsel for appellants to any authority, judicial or statutory, authorizing the vacation of a judgment nine years after its rendition, when the presumption uncontradicted and unexplained by the record is that all of the parties were not only before the court but of age and laboring under no disability at the time of its rendition. It is said, however, that, as the judgment was obtained by fraud, it should be vacated for this cause. The averments of the petition are that the judgment was fraudulently and wrongfully procured, in that "D. J. Wheeler was one of the attorneys for their ancestor Stephen H. Wheeler in the suit of E. L. Howard against Stephen H. Wheeler, and the plaintiffs state that the said defendant D. J. Wheeler, without giving their ancestor Stephen Wheeler any notice of his action as attorney, somehow or other became interested for the plaintiff and used his power, ability, and influence in procuring the said judgment rendered in the original action, which conduct of the defendants was wrongful and fraudulent." A party against whom a judgment has been procured by the fraud of the successful party may have it vacated upon a proper showing, if the application is made within the time allowed by section 2519, Ky. Stats., 1903, providing that, "in actions for relief for fraud or mistake, or damages for either, the cause of action shall not be deemed to have accrued until the discovery of the fraud or mistake; but no such action shall be brought ten years after the time of making the contract or the perpetra-

Digitized by Google

tion of the fraud." Lawless v. Sevier, 5 Ky. Law Rep., 239. But the petition in an action to obtain relief from a judgment by fraud should point out specifically and fully the fraud relied on. McCarthy v. Payne, 5 Ky. Law Rep., 242. A mere statement that the judgment was obtained by fraud is not sufficient. Tested by this rule, the petition before us is not good. The averment above mentioned, stating the fraud relied on, is neither full nor definite enough. We may also add that the record in the action in which the alleged fraudulent judgment was obtained, and which is filed with the petition seeking to set the judgment aside and as a part thereof, shows that one A. P. Cooper was the attorney for Stephen Wheeler, and that D. J. Wheeler, whose acts are complained of, represented himself as attorney after he filed his petition asserting ownership to the land, and the depositions taken in that case also disclose that Stephen H. Wheeler and his heirs were represented by counsel.

Upon the whole case, we see no error in the record, and the judgment is affirmed.

Digitized by Google

CASE 54.—PROCEEDING BY BETTIE L. MURRAY AGAINST KATIE L. MURRAY AND OTHERS FOR THE APPOINTMENT OF A RECEIVER TO TAKE CHARGE OF CERTAIN LAND ON WHICH THE PLAINTIFF HAS A LIEN.—January 24.

Murray v. Murray, &c.

Appeal from Todd Circuit Court.

W. P. SANDIDGE, Circuit Judge.

From the judgment both parties appeal. Affirmed on appeal and reversed on cross appeal.

1. Vendor and Purchaser—Lien of Vendor—Enforcement—Receiver—Evidence.—In a suit by a vendor for the appointment of a receiver of property on which she has a lien, evidence considered, and held insufficient to warrant granting the relief sought.
2. Same—Insufficiency of Property.—Civil Code Prac., sec. 298, provides that, on motion of any party to an action who shows that he has a lien on any property, the right to which is involved in the action, and that the property is in danger of being lost, removed, or materially injured, the court may appoint a receiver to take charge of the property. Section 299 provides for the appointment of a receiver of mortgaged property at the instance of the mortgagee for the same reasons, and, in addition, if the property is probably insufficient to discharge the mortgage debt. Held, that a receiver will not be appointed at the instance of the vendor, who has a lien for the purchase price, where the property is in no danger of being materially injured, though it may not be sufficient to satisfy the debt.
3. Same—Rents and Profits.—The rents and profits of property cannot be set apart for the benefit of the vendor, unless done under authority of Civil Code Prac., sec. 298, providing for the appointment of a receiver if the property is in danger of being lost, removed, or injured.

Digitized by Google

PERKINS & TRIMBLE, attorneys for appellant.

1. Sec. 298 of the Civil Code gives a lien holder the right to sequester rents in such a state of case as is presented in this record.

2. The death of the debtor does not defeat a creditor's right under Sec. 298 of the Code, nor in any way impair or diminish such right.

3. Prior to the death of the debtor neither the widow nor children, nor the common creditors had any claim to or lien upon these rents, but the lien holder did have an inchoate right to them, the assertion of which was not limited to the lifetime of the debtor. So that, even though on the death of the debtor, the widow and infant children as well as the unsecured creditors might acquire such interest in or right to these rents, it must be considered that their rights or interests are subject to the prior inchoate right of the lien holder which, when put into effect, would defer the subsequently acquired rights of the widow and children and the unsecured creditors.

AUTHORITIES CITED.

Civil Code, sec. 298; Mayfield v. Wright, 21 Ky. Law Rep., 1255; Wooley v. Holt, 14 Bush, 791; Newport & Cin. Bridge Co. v. Douglass,' trustee, 12 Bush, 707; Nesbit v. Wood, 22 Ky. Law Rep., 129; Ky. Statutes, sec. 1403 and 3862.

PETRIE & STANDARD, attorneys for appellees.

POINTS AND AUTHORITIES.

1. The court did not err in refusing to appoint a receiver to take charge of the growing crops. Such crops became assets in the hands of the administrators to be held by them for the benefit of all creditors. (Section 3862, Ky. Statutes.)

2. The court erred in appointing a receiver to rent out the farm for the years 1907 and 1908 for the reason that the widow of decedent is entitled to dower in said land and to one-third of the rents and profits thereof until dower is assigned. (Section 2138, Ky. Statutes; Wilson v. Ewing, 79 Ky., 549, 3 Ky. Law Rep., 362.)

3. Because there was no proof showing any act of injury committed or about to be inflicted upon said property by the parties then in possession, to-wit, the widow and children. (Floors' Extr. v. Floors, 87 S. W. Reporter, 272; Columbia Finance & Trust Co. v. Morgan, 19 Ky. Law Rep., 1761.)

Digitized by Google

4. Because the evidence did not authorize the appointment of a receiver if C. P. Murray, had been living at the time same was offered.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER.

The only question involved in this case is whether or not the orders of the judge of the lower court relating to the appointment of a receiver can be sustained. In February, 1904, the appellant sold to C. P. Murray a tract of land containing 215 acres, for which he agreed to pay $4,200. He executed to her for this amount five notes, for $840 each, due, respectively, in one, two, three, four, and five years from date. C. P. Murray died on the 13th day of June, 1906, leaving surviving him his widow and four infant children. During his life, and with the consent of appellant, he sold 13 acres of the land. At the time of his death no part of the consideration had been paid, and appellant had also paid the taxes for the years 1903 and 1904. Neither the notes nor the deed provided that, upon the failure of Murray to pay any of the notes, all of them should become due, so that in June, 1906, the notes due in February, 1905 and 1906, were unpaid, as were the notes due in 1907, 1908, and 1909. On the 16th day of June, 1906, appellant brought this suit against the widow and children, averring that the land could not be divided without materially impairing its value, setting up her indebtedness, and alleging that the property was insufficient to satisfy her debt, and that it was in danger of being materially injured, and would be so materially injured, unless the court took charge of same; that there was wheat, corn, and tobacco growing upon the land; and she asked for the appointment of a receiver to take charge of the land, and that the

Digitized by Google

crops then growing on the land be subjected to the payment of her debt. On the 20th of June, the widow and G. S. Weathers were granted letters of administration on the estate, and on the same day appellant filed an amended petition, alleging that the decedent left no personal estate, except what was exempt, and asking for a settlement of his estate.

The evidence heard by the judge with few exceptions, was in the form of affidavits; there being about an equal number introduced in behalf of each party. The substance of the affidavits introduced in behalf of appellant was that the decedent paid for the land as much as it was worth; that the farm had been cropped heavily in 1904, 1905, and 1906, which, in connection with the usage of it, had caused the land to deteriorate and diminish in value; that when Murray bought the land there were 12 or 15 acres of fairly good timber on the same, which he had cut; and that the property was in danger of being materially injured by reason of its usage and want of care, and there was much danger that the plaintiff would lose a part of her debt. The affidavits for appellee were in substance that Murray cultivated the land in a farmlike manner; that he improved the land in divers ways; that no timber was sold from the place, or cut, except that which was used in making some improvements; and that the farm was in better condition than when the appellant owned it, and worth more money than when she sold it—some of the affiants putting the increased value at as much as $500. We think it may be fairly said that the evidence discloses that the farm, when the application was made, was in about the same condition that it was when appellant sold it, and worth about the same amount. Appellant's security had been lessened, however, by the fact that 13 acres of the land had

Digitized by Google

been sold. The judge refused to place the land or crops in the hands of a receiver in 1906, but did order the court receiver to take charge of it during the years 1907 and 1908. Of this order both parties complain.

Civil Code Prac., sec. 298, in part provides that, "on the motion of any party to an action who shows that he has * * * a lien upon or interest in any property or fund, the right to which is involved in the action, and that the property or fund is in danger of being lost, removed or materially injured, the court or the judge thereof during vacation may appoint a receiver to take charge of the property or fund during the pendency of the action." The only authority for the appointment of a receiver in a case like this is to be found in this section, and it must be made to appear that the property which is sought to be put in the hands of a receiver is in danger of being lost, removed, or materially injured, or (we might more properly add) that the property is in danger of being "materially injured," as there is no danger that this property will be lost or removed. There is a marked distinction, and one that has been carefully preserved by this court, as we will proceed to show, between the section of the Civil Code of Practice quoted and section 299, providing that, "in an action by the mortgagee for the sale of mortgaged property, a receiver may be appointed if it appear that the property is in danger of being lost, removed, or materially injured, or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." Under this latter section a receiver may be appointed to take charge of the mortgaged property, if it appear that the condition of the mortgage had not been performed, and that the property is proba-

Digitized by Google

bly insufficient to discharge the mortgage debt, although the mortgagee might be unable to show that the property was in danger of being lost, removed, or materially injured. A general lien-holder cannot obtain the appointment of a receiver upon a showing that his debt is overdue and that the property incumbered by the lien is probably insufficient to pay it. He must establish that the property is in danger of being lost, removed, or materially injured. The property may not be sufficient to satisfy his debt; but this fact alone will not authorize the court to put it in the hands of a receiver.

There is no pretense that appellant is entitled to the rents or profits of the land by virtue of any contract, and in the absence of a contract it is clear that the rents and profits cannot be set apart for the benefit of appellant, unless it can be done under section 298. Woolley v. Holt, 14 Bush, 788; Douglass v. Cline, 12 Bush, 608; Newport & Cincinnati Bridge Co. v. Douglass, 12 Bush, 673; Nesbitt v. Wood, 56 S. W., 714, 22 Ky. Law Rep., 127; Mayfield v. Wright, 54 S, W., 864, 21 Ky. Law Rep., 1255. Therefore, in determining whether or not a vendor, in a suit to enforce the collection of his lien notes, is entitled to a receiver to take charge of the land and rent it out for his benefit, we must look entirely to section 298, and apply the provisions thereof to the facts of the case. It is stated in Collins v. Richart, 14 Bush, 621, that "courts of equity have always been reluctant to interfere with the possession of real estate by the appointment of a receiver, and they never do so unless the remedy at law is incomplete. The vendor, who conveys and puts his vendee in possession, reserving a lien for the purchase money, reserves that lien upon the land, and not upon the rents and profits. He vests the vendee with the legal title and

Digitized by Google

the right under the contract of sale to use and occupy the property. He looks to the land and to his personal judgment against his vendee for the satisfaction of his claim. The right to possess and use the land by the vendor does not follow as an incident to the breach of the vendee's covenant to pay. The vendor occupies a no more favorable attitude, so far as concerns the property and property rights of the vendee, than any other creditor, except to the extent of his lien upon the land sold by him." In Columbia Finance & Trust Company v. Morgan, 44 S. W., 390, 19 Ky. Law Rep., 1762, this court said: "In an application to appoint a receiver by a vendor, the motion should not prevail unless it is made manifest, not only that the party in possession is insolvent and the property insufficient to pay the debt, but also that the party in possession is committing or threatening to commit waste or by bad husbandry impairing the value of the plaintiff's security. In this instance it appears from the affidavits which are wholly uncontroverted that the vendee was hopelessly insolvent and that material and irreparable damage would result to the farm from plowing up the grass land." Therefore the application for the receiver in that case was granted. Here there is no evidence that the parties in possession of the land are doing or threatening to do anything that will materially or at all injure it, nor is there any effort to show that they have committed or will commit any waste or depredation that would lessen the security of the vendor. The entire motion is based upon the fact that the decedent had not properly cultivated the land, and had by his unfarmerlike methods depreciated its value, and had cut some timber from it, every ground upon which the receiver was sought being strongly contested.

Digitized by Google

When the court, as in this case, undertakes to give to the vendor additional security for his claim, or, in other words, to extend the contract so as to embrace in it for his benefit property that was not included in the contract, or contemplated by the parties when it was made, the evidence should be very convincing, and bring the applicant fairly within the Code provision authorizing the court to give him this additional security. The mere fact that a portion of the lien debt is due and unpaid, or that other parts of it will not be due for some period of time, or the possibility that the property may be depreciated in value before all of the lien notes fall due, is not sufficient to authorize the interposition of the courts. The parties who made the contract must be presumed to have understood its meaning and effect. The vendor voluntarily extended over a period of years the payment of the lien debt, without providing for the maturity of the whole of it upon default in the payment of any of it. When appealing to the court to make a material alteration in or addition to the contract for his protection, he should come prepared to fully show that under the law he is entitled to the relief sought. It is quite a serious matter to take property out of which the persons in possession expect to make the money to pay the debt, and turn it over to the person to whom the debt is owing, thereby probably depriving the vendee of means and opportunity to pay the debt. It has been held by this court, and is undoubtedly correct, that when the vendee is materially injuring the property by committing waste or recklessly depreciating its value, and it is manifest that serious loss will result to the lienholder, the court will grant the relief necessary, rather to prevent the debtor from injuring the

Digitized by Google

security than to protect the creditor, although his protection results from the relief. But the court is primarily induced to grant the relief because of the misconduct or bad faith of the debtor. In the case before us there is no evidence whatever that the persons in possession of the land at the time the receiver was appointed were injuring the land in any way, or guilty of any bad faith or other misconduct that would indicate a purpose on their part to depreciate the value of the land or deprive the lien-holder of any right to which he was entitled. We do not mean to hold that the mere fact that the property had passed from the possession of a person who was injuring it into the possession of a person who would protect it would deny to the creditor the right to bring a suit immediately upon the transfer. That question is not before us.

The evidence exhibited in this record is not of such a character as to authorize the court to take this property from the person now in possession of it and give the rents and profits to the vendor. After carefully considering this record and the briefs of counsel, we have reached the conclusion that the evidence did not warrant the judge in appointing a receiver to take charge of the property for the years 1907 and 1908, or authorizing the appointing of a receiver for the year 1906.

Wherefore the order is affirmed on the original and reversed on the cross appeal.

Digitized by Google

CASE 55.—ACTION BY. J. M. ROBINSON, NORTON & CO., AGAINST THE CORSICANA COTTON FACTORY AND OTHERS.—January 24.

124 435
126 76

J. M. Robinson, Norton & Co. v. Corsicana Cotton Factory, &c.

Appeal from Jefferson Circuit Court; Chancery Branch (Second Division).

SAMUEL B. KIRBY, Judge.

From the judgment plaintiff appeals. Affirmed.

1. Merchant Brokers — Authority — Purchasing From — Risk Assumed.—A merchandise broker is one who negotiates the sale of merchandise without having it in his possession. He is an agent with very limited powers and ordinarily has no authority to receive payment for property sold by him for his principal; and a purchaser who pays the broker does so at his own risk and is not discharged from liability to the principal unless the authority of the broker to receive payment be expressed or may reasonably be implied from the circumstances.
2. Factors—Possession of Goods—Evidence of Ownership.—A factor or commission merchant is one who has the actual or technical possession of the goods or wares of another. The possession of the property is prima facie evidence of ownership, and being thus in possession for the purpose of sale a factor may sell it in his own name and collect the proceeds without disclosing the name of the principal.
3. Insolvent Broker—Selling Goods for Another—Knowledge of Purchaser—Rights of Owner.—Where a firm purchased goods from an insolvent broker and paid him for them with knowledge that they were not in his possession, and that he was selling them for another, such purchaser assumed the risk and is not entitled to recover the goods from the real owner.
4. On Motion for Damages—Judgments—Money Paid to Receiver

Digitized by Google

—Appeal—Supersedeas—Damages on Appeal.—An order for the payment of money to the receiver is a judgment for the payment of money, and, if superseded, on appeal, the ten per cent. damages allowed by section 764 of the Civil Code may be recovered thereon by appellee, if affirmed.

W. S. PRYOR and JAMES R. DUFFIN, attorneys for appellant.

POINT AND AUTHORITIES.

1. Appellee pleads that there was no agency existing between it and English-Greene Company; that it sold the goods direct to English-Greene Company. Therefore if any agency is proven, it must be the agency of a factor as under the agency of a broker no attempt at a sale between principal and agent could occur.

2. On all letter heads and invoices used by English-Greene Company in corresponding and dealing with both appellant and appellee, English-Greene Company held itself out as a commission merchant or factor.

3. Stock lists of goods in ware houses, or bleacheries, at Rockaway, New Jersey and Clearwater, South Carliona were delivered by appellee to English-Greene Company.

From this stock as shown by these lists the goods in question were sold.

4. Appellant had made previous purchases of appellee through English-Greene Company acting as its factor viz., October 17. 1903, and had paid for these goods and received same promptly.

5. The Court erred in assuming that appellant relied solely upon the letter heads of English-Greene Company.

6. Appellee authorized English-Greene Company to change routing.

7. It was not necessary that English-Greene Company have had actual possession of the goods to create the agency of factor. Constructive possession was sufficient. (Slack v. Tucker, 23 Wall, 321, 90 U. S., 143; Gibson v. Stevens, 8 Howard, 384; Lucas v. Dorrein, 7 Taunt, 288; Spear v. Travers, 4 Camp., 251; Chaplin v. Rogers, 1 East, 192; Searle v. Keeves, 2 Esp., 598; Rive v. Austin, 17 Mass., 204; Harman v. Anderson, 2 Camp., 243; Wilkes v. Ferris, 5 Johns, 335; Zwinger v. Samuda, 7 Taunt, 261; Atkinson v. Malin, 2 Term Rep., 462; Hodgson v. Le Bret 1 Camp., 233; Hurry v. Mangles, 1 Camp., 452; Manton v. Moore, 7 Term Rep., 67; Hollingsworth v. Napier, 3 Cow, 182; Pleasants v. Pendleton, 6 Rand., 473; Bentall v. Burn, 3 Barn and Cr., 423; Story on Sales, sections 311, 312, 390, 392; Ryall v. Rolle, 1 Atk., 171; Jewett v. Warren, 12 Mass., 300; Hinde v. Whitehouse, 7 East, 588; Barney v. Brown, 2 Vt., 374.)

Digitized by Google

8. English-Greene Company at no time offered to buy from appellee but at all times offered to sell for appellee.

Under these conditions and by this certain correspondence appellee accepted these identical orders by a telegram November 30, 1903, to English-Greene Company: "Your wire this day order accepted."

9. As early as January, 1904, English- Greene Company notified appellee that it had billed the goods out to appellant and was responsible for delivery. Yet appellee made no effort to disavow.

On February 27, 1904, Robinson-Hughes Company, in whose warehouse the goods were stored, notified appellee that the goods belonged to appellant and had been paid for to its agents, English-Greene Company. Still appellee did not disavow.

Principals must act promptly, and disavow, or they ratify. (1 Am. and Eng. Enc. of Law, 439 First Ed. (and cases cited) Clay v. Spratt, 7 Bush, 334.)

Therefore it is not necessary that English-Greene Company be a factor. Any agency whatever thus ratified would have bound appellee.

10. Appellee ratified all the acts of English-Greene Company by its letter of March 5, 1904, to Robinson-Hughes Company.

If a principal ratifies the acts of his agents, even for a moment, he is bound by them, and can no more deny the agent's authority. (1 Am. and Eng. Enc. of Law, 434.)

A principal that affirms and assumed the agency cannot afterwards disaffirm. (Whitfield v. Riddle, 78 Ala., 99; McGeoch v. Hooker, 11 Ills. App., 649.)

11. The court erred in its statement "It is conceded that that English Greene Company did not have either actual or constructive possession of the goods." Appellant no where conceded this. (Burton v. Goodspeed, 69 Ills., 237.)

12. Extent and power of a factor defined by usage. (3 Am. and Eng. Enc. of Law, 319 First Ed.; Randall v. Kehloss, 60 Me., 37; Upton v. Mills Co., 11 Cush., 58; Smith v. Tracy, 36 N. Y., 79; Palmer v. Hatch, 46 Mo., 585; Dennis v. Ashley's Adm'r, 15 Mo., 453; Roosevelt v. Doherty, 129 Mass., 301.)

13. Factors may sell in their own name the goods of their principals and bind their principals in the same way and to the same extent as if his own name were used. (3rd Am. and Eng. Enc. of Law, 321, First Ed.; Graham & Co. v. Duckwall, Fitch & Co., 8 Bush, 12; Slack v. Tucker, 23 Wall., 321; Burton v. Goodspeed, 69 Ills., 238; Blood v. Palmer, 11 Me., 414; Pinkham v. Crocker, 77 Me., 563; Miller v. Lea, 35 Md., 396; Spears v. Loague (Tenn.) 6 Cold., 420; Saladin v. Mitchell, 45 Ills., 79; Beardsley v. Schmidt, 98 N. W., 235; Haas v. Ruston, 14 Ind. App., 8.)

Digitized by Google

14. A factor may receive payment for his principal. (Adams v. Frazier, 82 Fed., 211; Traub v. Milliken, 57 Me., 63; Butler v. Dorman, 68 Mo., 298; Higgins v. Moore, 34 N. Y., 417-419; Pickering v. Busk, 15 East, 38 Eng.; Seiple v. Irwin, 30 Pa. St., 513; Rice v. Groffman, 56 Me., 434; Byrne, Ryan & Co. v. Schnoing, 6 B. M., 199; De Lazardi & Co. v. Hewitt, Allison & Co., 7 B. M., 697; Graham v. Duckwall, 8 Bush, 12.)

15. A purchaser may sue the principal on contracts made by an agent for an undisclosed principal. (Violett v. Powell's Adm'r, 10 B. M., 347; Wilson v. Thompson, 1 Met., 123; Jones v. Johnson, 86 Ky., 530; Tutt v. Brown, 5 Littell, 1; Pope v. Meadow Springs Dist., 20 Fed., 35; Ford v. Williams, 2 How., 287; New Jersey Steam Navigation Co. v. Merchants Bank of Boston, 6 How., 465; Graham v. Duckwall, 8 Bush, 12; Kayton v. Barnett, 116 N. Y., 625; Freund v. Hixon, 49 Pacific, 640; Elliott v. Bodine, 36 Atl., 1038; Harrison v. Schoff, 101 Ia., 463; Pentz v. Stanton, 10 Wend. (N. Y.) 271; Taintor v. Prendergast, 3 Hill, 72; Raymond v. The Mills Co., 2 Met. (Mass.) 319; Burton v. Goodspeed, 69 Ills., 237.)

16. Graham v. Duckwall, 8 Bush, 12, distinguished.

WATTS & GIFFORD, attorneys for appellee, Corsicana Cotton Factory.

CLASSIFICATION.

1. A broker is a mere negotiator between two parties and acts in the name of his employer. (Graham & Co. v. Duckwall, Fitch & Co., 8 Bush, page 12.)

Merchandise brokers are those who negotiate the sale of merchandise, without having it in their possession or control. (American & Eng. Ency., vol. 4, page 961.)

"A factor is a commercial agent to whom the possession of personal property is entrusted by and for the owner, to be sold for compensation, in pursuance of the agent's usual trade or business,". (American & Eng. Ency. of Law, vol. 12, page 628.)

OPINION OF THE COURT BY JUDGE BARKER—Affirming.

All of the parties to this litigation are corporations. The appellant, J. M. Robinson, Norton & Co., is a wholesale dry goods dealer in Louisville, Ky. The appellee operates a cotton mill in Corsicana, Tex.

Digitized by Google

The English-Greene Company was a merchant broker residing in New York. This latter company sought to purchase certain cotton goods from the appellee, and to re-sell the same at an advanced price to the appellant. Appellee had no confidence in the English-Greene Company, and undertook to escape the hazards of the credit system by selling for cash. The wisdom of this precaution seems to have been justified by what afterwards occurred. The English-Greene Company ordered appellee to ship the goods to Louisville. This was done by appellee, with the precaution of billing it in its own name and then forwarding the bills of lading to New York with a draft for the purchase money attached thereto, thus reserving possession of the property until the purchase price was paid. In the meantime the English-Greene Company had drawn on its vendee, J. M. Robinson, Norton & Co., for the price of the goods it was to deliver, and the latter paid the draft. The draft drawn by the appellee on the English-Greene Company for the money due it went to protest, and, of course, the bills of lading were not delivered. With matters standing thus, appellant finding that the goods were in Louisville, although in the name of the owner (appellee), brought this action to obtain them. The right of the appellant to obtain the goods without paying for them was denied by the appellee, and as one of the two must lose, owing to the insolvency of the English-Greene Company, the question arises whether or not this loss must fall upon appellant, who seems to have trusted the English-Greene Company absolutely, or appellee, who refused to trust it at all. As the chancellor of the second chancery division of the Jefferson circuit court, who tried the case below, has written an opinion lucidly stating the facts and

Digitized by Google

correctly drawing the legal conclusions therefrom, we adopt it as our own. It is as follows:

"On or about the 27th day of November, 1903, the plaintiff, J. M. Robinson, Norton & Co., contracted to buy from English-Greene Company, a New York corporation, certain cotton goods. The price agreed upon was $1,052.18, upon which plaintiff was to have a discount for cash in ten days of 2 per cent. The statements or bills of sale furnished plaintiff by English-Greene Company were dated December 5, 1903, and December 8, 1903. These statements of sales were indorsed by English-Greene Company to their bankers, Krauth, Nachod & Kuehne, for collection, and on December 17, 1903, the plaintiffs, in order to avail themselves of the discount of 2 per cent, paid Krauth, Nachod & Kuehne the net amount of the consideration by a draft upon their (plaintiff's) bank in New York City. English-Greene Company was a corporation doing the business of a commission merchant and broker, with offices in Providence, R. I., and New York City. The merchandise sold by them was the property of the defendant, Corsicana Cotton Factory, of Corsicana, Texas, and was at the time of the sale in the possession of the defendant, although in New Jersey. Upon request from English-Greene Company to ship the merchandise to Louisville, Ky., to their order, the Corsicana Cotton Factory shipped it to Louisville, but to their own order, and forwarded the bills of lading, with the drafts attached, to English-Greene Company at Providence. These drafts of the Corsicana Cotton Factory were never paid by English-Greene Company, or by any one for them, and the merchandise was never received by the plaintiff, the defendant refusing to surrender the bills of lading or allow the plaintiff to take possession of

Digitized by Google

the goods unless they were first paid for. English-Greene Company is a non-resident or foreign corporation, and is bankrupt. In this effort to recover the money paid by plaintiffs, the goods were attached.

"The right of plaintiff to recover in this action depends upon the relationship of English-Greene Company to the Corsicana Cotton Factory. It is earnestly urged by plaintiff that English-Greene Company was a factor or commission merchant, representing the defendant cotton factory, and as such was authorized to sell the goods and to collect the proceeds. Upon the other hand, the defendant insists that it owes no duty to plaintiff, because, at most, English-Greene Company was a mere merchandise broker, and as such had no authority to collect the proceeds. The law makes a very wide distinction between merchandise brokers and factors, or, as they are most frequently called, 'commission merchants.' A factor or commission merchant is one who has the actual or technical possession of goods or wares of another for sale. Thus the property may be in his own warerooms, or he may have a warehouse receipt of bill of lading. The possession of the property is prima facie evidence of ownership. Being thus intrusted with possession of it by the owner for the purpose of sale, a factor may sell it in his own name, without disclosing the name of his principal, and he may collect the proceeds and give the purchaser a complete acquittance. Am. & Eng. Ency. of Law (2d Ed.), volume 12, pp. 628, 636. Merchandise brokers are defined to be 'those who negotiate the sale of merchandise without having it in their possession or control.' Am. & Eng. Ency. of Law (2d Ed.), volume 4, p. 961; Story on Agency, section 34. He is simply an agent with very limited powers, and with reference to right to receive payment it is universally held:

Digitized by Google

'A broker has, ordinarily, no authority to receive payment for property sold by him for his principal, and a purchaser who pays the broker does so at his own risk. Such payment does not discharge him from liability to the principal, unless the authority of the broker to receive payment be express or may reasonably be implied from the circumstances.' Am. & Eng. Ency. of Law (2d Ed.), volume 4, p. 965; Mechem on Agency, section 949; Graham v. Duckwall, 8 Bush, 12; Seiple v. Irwin, 30 Pa. 513; Higgins v. Moore, 34 N. Y. 417; Basset v. Lederer, 1 Hun (N. Y.), 274; Crosby v. Hill, 39 Ohio St. 100. There is also a very instructive case in point in Saladin v. Mitchell, 45 Ill. 79. A broker differs from a factor in that he has not possession of the goods to be bought or sold for his principal. Story on Agency, section 34; Slack v. Tucker, 23 Wall (U. S.) 321, 23 L. Ed. 143. Whether the selling agent has possession of the wares determines the character of his agency. That is the test, and the law defining their respective duties and powers is as old as the law of commerce.

"Plaintiff has cited the case of Slack v. Tucker, 23 Wall (U. S.) 143, 23 L. Ed. 143, as supporting its contention; but an examination of that opinion shows that the question before the court was one of taxation under a federal revenue statute, and, while the court upheld Upham, Tucker & Co., who were conducting business by methods somewhat similar to the methods of English-Greene Company, to be commission merchants, that case can be distinguished from the case at bar. It is conceded that English-Greene Company did not have either actual or constructive possession of the goods, and it follows, therefore, that they were simply merchandise brokers. It is true, as urged by counsel for plaintiff, that upon English-Greene Company's letterheads they styled themselves 'Commis-

Digitized by Google

sion Merchants;' but that circumstance cannot affect the question. A commission merchant may be a broker for any number of transactions, and a broker may also act in the capacity of a factor. It is the transaction which makes him a broker or a factor, and not what he may choose to style himself. Moreover, the plaintiff knew the character of agency of English-Greene Company, when the letter written November 30, 1903, to them by English-Greene Company was received. That letter was as follows: 'J. M. Robinson, Norton & Co.—Gentlemen: Your favor of the 27th received. Enclosed please find order sheet for 3c ducks. Have written mill to have goods shipped K. D., instead of Cont. Line. Regarding labeling these goods, we cannot very well have this done. This is a little lot of goods owned by a mill. We are merely selling for them, and price is very low, so they do not like altering the condition of the goods any; but they are all firsts, no seconds among them. Would be glad if you can use some of the other styles. Yours truly, English-Greene Company, Lovett.' This letter advised plaintiff that the goods were not in English-Greene Company's possession, but were in the possession of the 'mill.' It, moreover, advised plaintiff that the goods were owned by a 'mill,' and that English-Greene Company were 'merely selling for them.' With this letter before them, they took upon themselves the risk of loss when they paid English-Greene Company.

"The plaintiff's petition must be dismissed, and the attachment discharged, and the defendant given judgment for costs."

For the reasons given in the foregoing opinion of the Chancellor, the judgment is affirmed.

Digitized by Google

OPINION OF THE COURT BY JUDGE HOBSON ON MOTION FOR DAMAGES—Motion sustained.

During the progress of the action the property attached was sold. Appellant was the purchaser at the sale and executed bond for the price, $730. In its final judgment the court dismissed appellant's petition, discharged the attachment, ordered appellant to pay into court the amount of its bond, $730, and ordered that as soon as the money was paid into court, the appellee might immediately withdraw it. Appellant appealed, superseding the judgment. The judgment was affirmed. (J. M. Robinson-Norton Co. v. Corsicana Cotton Factory, 30 Ky. Law Rep., 580.) Appellee has entered a motion for damages on the supersedeas.

By section 764 of the Civil Code ten per cent. damages on the amount superseded shall be awarded against the appellant upon the affirmance of a judgment for the payment of money the collection of which has been superseded. The judgment here appealed from was a judgment for the payment of money by the appellant. Its collection was superseded. The order for the payment of the money into court and its immediate withdrawal by appellee was only a form of requiring the money to be paid by appellant to appellee. The fact that the receiver was to take the money from the appellant and immediately pass it on to appellee did not change the substance of the transaction. The receiver was only the medium through whom the money was to pass from appellant to appellee. Appellant, by reason of the supersedeas, kept the money and had the use of it. The ten per cent. damages are allowed on judgment for the payment of money if superseded to deter parties from refusing to pay over money pursuant to the judgment

Digitized by Google

and thus endangering the rights of the appellee. An order for the payment of money to the receiver is a judgment for the payment of money. The fact that payment is to be made to an officer makes it none the less a judgment for the payment of money, than if the payment is to be made to an individual.

An order for the distribution of a fund in court is not an order for the payment of money by the appellant. He does retain the use of the money by means of the supersedeas. It then remains in the custody of the court. So such orders have been held not judgments for the payment of money. But the judgment here superseded was literally a judgment for the payment of money and damages on the supersedeas must be awarded.

Motion sustained.

CASE 56.—PROSECUTION AGAINST WILLIAM CALLAHAN FOR FIRING A DEADLY WEAPON AT RANDOM UPON THE PUBLIC HIGHWAY.—January 25.

Callahan v. Commonwealth

Appeal from Leslie Circuit Court.

T. G. Lewis, Special Judge.

Defendant convicted and appeals. Reversed.

Shooting at Random on Public Highway—What Constitutes Offense.—Where persons engaged for pastime in shooting from the public highway with pistols at a mark on a hillside, outside of the highway, and not in range of persons near the highway or traveling thereon, or in the direction of a dwelling

Digitized by Google

house, they are not guilty of the offense of shooting at random upon the public highway, under Kentucky Statutes, section 1308.

J. M. MUNCY, attorney for appellant.

We submit that the court erred in its instructions to the jury. The meaning of the word "random" is: A roving motion or course without direction; hazard; chance; and the definition of "at random" is: without a settled point of direction; at hazard. (Webster.)

N. B. HAYS, Attorney General, and C. H. MORRIS, for appellee.

The court gave the following instructions: "Shooting at an object or target upon or along the highway means shooting at random in the meaning of the law."

This instruction was erroneous. It should have been as follows: "Shooting at random in the meaning of the law, means, shooting without any settled aim, purpose, or direction; left to chance; casual or haphazard."

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

Appellant was convicted and find $50 in the court below, under an indictment charging him with the offense of firing, at random, a deadly weapon on the public highway. He contends that he was improperly convicted, and should have been granted a new trial, and this appeal presents for our consideration the several alleged errors of which he complains. The facts as shown by the evidence were that appellant and others engaged in the pastime of shooting with pistols at a mark. While shooting they stood upon the side of, yet in, the public highway. The mark at which the shots were directed was on a hillside, and to one side of the highway, and it was not made to appear that the shooting was in the range of persons near the highway, or traveling thereon, or in the direction of a dwelling house.

Digitized by Google

It is contended by appellant that the instructions given the jury did not contain the law applicable to the facts of the case, and that the court erred in refusing to give the peremptory instruction asked by him after the evidence was all heard by the jury. The first instruction follows the indictment and appears to be unobjectionable in form. Nos. 3 and 4 are also substantially correct, unless the jury should have been given a peremptory instruction to find appellant not guilty. But instruction No. 2 incorrectly gave the law on the point in respect to which it attempted to advise the jury. It is as follows: "Gentlemen, shooting at an object or target upon or along a public highway, means shooting at random, in the meaning of the law." Tested by a former opinion of this court, the above instruction is radically wrong. The opinion referred to was delivered in the case of Commonwealth v. Bynum, 50 S. W. 843, 20 Ky. Law Rep. 1982. Though the opinion was not marked "to be reported," the case was considered, and the decision concurred in by the whole court. The indictment, as in the case at bar, charged the defendant with the offense of shooting at random on the public highway. A jury was waived by the defendant in the circuit court, and the case submitted to the court upon certain agreed facts. The facts were that the defendant, late at night, when to a tent meeting. Upon his arrival he found that the meeting had adjourned, and the congregation had left the grounds. From his buggy in the highway he shot a dog that was standing on the tent ground near by. The court adjudged the defendant not guilty, and from that judgment the commonwealth appealed. In passing upon the same question presented on the appeal, this court said: "Under these facts we are of opinion, as was the trial court, that appellee was not guilty of shooting at

Digitized by Google

random. The shot was not aimless or at haphazard, but was at a definite, specific thing. If the statute had intended to prohibit useless and unnecessary shooting on the public highway, no matter whether at a definite thing or not, as counsel for the State contends, it seems to us that very inapt words were used in the statute. If the lawmakers had intended the law to be as contended, they could easily have so framed the law. The difficulty in the way of such an act as counsel contends this to be and mean is that it would be a question of whether the shot was useless or unnecessary, if, indeed, any shot on the highway is necessary. * * * The statute can only mean shooting aimlessly, at haphazard, recklessly, without a definite object aimed at in the range of the weapon. As said by the learned trial judge in his opinion: 'It seems that the word random in this section has its popular meaning, done at hazard, or without any settled aim, purpose, or direction; left to chance, casual or haphazard. Webster. When the phrase at random is used it is applied only to anything done at haphazard, or chance. Encyclopædia Dictionary. It therefore follows that, when the defendant, with a fixed purpose, intentionally shot at a dog, or shot a dog, he was not in any sense of the word guilty of shooting at random.'' This in our opinion fairly states the law. If unnecessarily shooting an unoffending dog was not shooting at random, we are at a loss to understand how shooting at a mark or target can be shooting at random. In shooting at a mark appellant was not shooting at random; that is, aimlessly or at haphazard. The shooting was with settled aim, at a definite object, and for a definite purpose, though done from the public highway. The shooting was unnecessary, but if, as held in the case supra, that fact, together with its having

Digitized by Google

been done in the public highway, did not constitute the offense denounced by the statute, appellant was improperly convicted. It therefore follows that the court should have complied with his request, and granted the peremptory instruction directing the jury to find him not guilty.

Judgment reversed, and cause remanded for a new trial, and other proceedings consistent with the opinion.

CHIEF JUSTICE O'REAR and JUDGE LASSING dissent.

CASE 57.—ACTION BY MARGARET CAIN'S ADMINISTRATOR AGAINST THE KENTUCKY & INDIANA BRIDGE AND RAILROAD COMPANY TO RECOVER THE ALLEGED VALUE OF HER DOWER INTEREST IN A CERTAIN LOT.—January 25.

124 449
125 845

Cain's Adm'r v. Ky. & Indiana Bridge and R. R. Co.

Appeal from Jefferson Circuit Court, Chancery Branch (First Division).

SHACKELFORD MILLER, Judge.

From the judgment plaintiff appeals. Affirmed.

1. Dower—Demand for Assignment—Failure to Make.—Under Ky. Stats., 1903, sec. 2132, which provides that after the death of either the husband or wife the survivor shall have an estate of dower for his or her life in one-third of all the real estate of which the other was seized during coverture, the right to have dower assigned ends at the death of the surviving husband or wife, and does not pass to the personal representative.

Digitized by Google

2. Same—Rents and Profits.—Under the direct provisions of Ky. Stats., 1903, sec. 2138, a surviving wife is entitled to one-third of the rents and profits of her husband's dowable real estate from his death until dower is assigned; and, the rental paid her being all that reasonably could have been demanded, her administrator cannot recover more.

3. Covenants—Covenant Against Incumbrances—Construction—Creation of Trust.—A deed from the heirs of a deceased owner of land contained a covenant warranting the title against all claims and incumbrances, except the dower of the widow of the deceased owner, "which claim for dower said second party (grantee) is to procure without cost to said first parties." Held, the language of the covenant did not create a trust in favor of the widow and a lien upon the lot as security for the value of the dower interest, the value of which it was alleged was retained by the grantee out of consideration for the premises.

4. Same.—A deed from the heirs of a deceased owner of land contained a covenant warranting the title against all claims and incumbrances, except the dower of the widow of the deceased owner, "which claim for dower said second party (grantee) is to procure without cost to said first parties." Held, that the language of the covenant did not impose upon the grantee any undertaking to compel the widow to assert her claim of dower, or to take legal steps to divest her of it.

FONTAINE T. FOX for appellant.

POINTS AND AUTHORITIES.

1. What is an equitable lien. (Pomeroy's Equity, vol. 3, page 242, sec. 1244; Ibid, vol. 3, page 232, sec. 1235; Ibid, vol. 3, page ——, sections 1233, 1234; Ibid, vol. 1, page 146, sec. 166.)

2. Who is an innocent purchaser without notice, or a purchaser with notice. (Pomeroy's Equity, vol. 2, page 36, sec. 604; Ibid, vol. 2, page 40-1, sec. 606; Ibid, vol. 2, page 45, sec. 608.)

3. Nature and species of constructive notice. (Pomeroy's Equity, vol. 2, page 46, sec. 609; Ibid, vol. 2, page 65, sec. 626; Ibid, vol. 2, page 66, sec. 627; White & Tudor's Cases in Equity, Amer. notes, vol. 2, pages 144, 153 and 157; Ibid (LeNeve v. LeNeve), part 1, vol. 2, page 109; Johnston v. Gwathmey, 4 Litt., 321; Honore's Exor. v. Bakewell, 6 B. M., 73; Pepper v. Thomas, 85 Ky., 542; Davis v. Logan, 9 Dana, 187; 94 U. S., 734; 18 U. S., 332; 93 U. S., 631; 101 U. S., 731; 14 Wall., 244; Graves v. Graves, 1 A. K. Mar., 109; Corn v. Sims, 3 Metc., 400-1.)

Digitized by Google

4. The trial judge erred in his construction of defendant's exceptions to commissioner's report.

5. The trial judge erred in dismissing petition based on his own misconstruction.

6. Criticism. of the application made by the trial judge of Bailey v. Louisville Railway Co., 22 Ky. Law Rep., 1399, to the commissioner's report.

HUMPHREY & HUMPHREY and CHAS. G. MIDDLETON for appellee.

POINTS AND AUTHORITIES.

1. The dower interest of the wife, being a life estate in one-third of the real property of which the husband was seized, ceases with the death of the wife. (Holmes v. McGee, 20 Miss., 411; Stockwell v. Sargent, 37 Vt., 16.

2. The administrator, in the absence of debts of his decedent, being only concerned with the personal property cannot enforce an action to recover an interest in real property belonging to his decedent. (A. & E. Ency. of Law, vol. 11, 1035, and numerous cases cited there.)

3. By the agreement in the deed of 1886 the Kentucky & Indiana Bridge Company bound itself to secure the dower interest of Margaret Cain only in the event that the said Margaret Cain, or her committee or friends, undertook to enforce the same.

4. Assuming that the agreement in the deed of 1886 is in accordance with the appellant's contention herein still the Kentucky & Indiana Bridge Company has fully performed the same. (Section 2132, Kentucky Statutes.)

5. The position of the appellee herein is entirely equitable.

6. The appellee herein is a bona fide purchaser for value.

7. The appellee was not put upon notice by agreements not appearing on the face of the deed, or by agreements in the deed which would not put a reaonably diligent person upon notice. (Bailey v. Southern Ry. Co. in Ky., 22 Ky. Law Rep., 1379.)

8. Assuming that the appellee was put upon notice, yet, as the Kentucky & Indiana Bridge Company had fully performed its part of the agreement there can be no claim upon the property in favor of Margaret Cain, or her representative.

Digitized by Google

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

Prior to 1886 Thomas Cain died in Jefferson county, intestate, leaving surviving him a widow, Margaret Cain, then and until her death an adjudged lunatic, and three adult children, John Cain, Ellen Cain and Mary A. Cain, who were his only heirs at law. In 1886 his three children sold and by deed conveyed to the Kentucky & Indiana Bridge Company a certain tract of ground in the city of Louisville at the agreed price of $1,500, cash in hand paid. By a covenant expressed in the deed the grantors warranted the title conveyed "against all claims and encumbrances, except the dower of Margaret Cain, widow of said Thomas Cain, which claim for dower for said second party (grantee) is to procure without costs to said first parties." The lot in question was in 1898 sold, with other property of the Kentucky & Indiana Bridge Company, under a decree rendered in a suit brought against it by the Youngstown Bridge Company, and immediately thereafter the Kentucky & Indiana Bridge Company went out of existence. Judson Harmon and A. P. Humphrey became the purchasers of the lot and other property sold under the decree referred to, and, the sale having been duly confirmed by the court, they were by deed invested with the title to the property. Later these purchasers sold and by deed conveyed the lot to the appellee, Kentucky & Indiana Bridge and Railroad Company, the present owner thereof. Margaret Cain died in the year 1896, and on January 15, 1903, nearly seven years after her death, appellant, Andrew J. Sea, Jr., as administrator of her estate, instituted this action against appellee, present owner of the lot in question, to recover of it the alleged value of Margaret Cain's dower therein, which is placed in the petition at $500.

Digitized by Google

Appellee resisted the recovery sought upon various grounds set forth in its answer as amended, some of which it will be unnecessary to discuss. On final hearing the lower court reached the conclusion that there was no merit in the claim of the administrator; hence, by the judgment rendered, the action was dismissed, and the administrator has appealed.

We are of opinion that the judgment complained of was the only one that could properly have been rendered on the record presented. Dower is thus defined by section 2132, Ky. Stat., 1903: "After the death of either the husband or wife, the survivor shall have an estate for his or her life in one-third of all the real estate of which he or she, or any one for his or her use, was seized of an estate in fee simple during the coverture, unless the right to such dower or interest shall have been barred, forfeited or relinquished. * * *" Section 2138 of the Kentucky Statutes, supra, provides: "The wife shall be entitled to one-third of the rents and profits of her husband's real estate from his death until dower is assigned. * * *" It is conceded that Mrs. Cain was entitled to dower in the lot sold and conveyed appellee's vendor by the heirs at law of her deceased husband, Thomas Cain, and that it was never assigned. It might have been assigned by procurement of a committee appointed by the court for that purpose, or at the suit of the other parties in interest, but the fact remains that it was not done. This being true, the right to have dower assigned ended at her death, because the dower interest was extinguished by the happening of that event. Therefore such right did not survive or pass to the personal representative, and he cannot claim or exercise it. But as the widow continued the owner of the dower until her death, and it remained unassigned, she was, by virtue of the pro-

Digitized by Google

visions of the statute supra, entitled to receive one-third of the rents and profits of the entire lot as long as she lived; that is to say, from the death of her husband down to the time of her own death. Martin v. Curd's Admr., 1 Bush, 327; Wilson v. Ewing, 79 Ky., 549; Morton's Exrs. v. Morton's Exr., 66 S. W. 641, 23 Ky. Law Rep. 2079.

It appears from the record that she received from appellee's predecessor, the Kentucky & Indiana Bridge Company, $30 per year as long as she survived her husband. Indeed, the last annual payment seems to have embraced the entire rental year, in the early part of which she died. The yearly rental thus paid Mrs. Cain was arrived at in this way: As the estimated market value of the entire lot was $1,500, and one-third of that sum $500, six per cent interest thereon would amount to $30 per annum, which was the sum annually paid her as the rental value of her dower in the lot. This appears from the record to have been a fair basis for ascertaining what the widow should have received by way of income from her dower interest in the lot. It is not denied that appellee's vendor paid the $30 annual rental for the time alleged in the answer, or that the widow got the benefit of it. No explanation of the failure to assign dower before the death of the widow appears in the record. If, as we suspect, it was because the lot was indivisible, that fact would seem to afford a reason for such failure, as a suit for its sale and a division of the proceeds would have been necessary, which would have put the widow and heirs at law to considerable cost, and might have resulted in a sale of the lot upon terms less advantageous to both the widow and heirs than those upon which it was privately sold by the latter. And in an action for a decretal sale of the lot and division of the proceeds the widow, instead

Digitized by Google

of being allotted dower in kind, would have received its value in money according to her expectancy of life as shown by the American Annuity Table. It appears from the report of the commissioner, found in the record, that her age at the time of the conveyance of the lot by her children to appellee's vendor was 55 years; that her dower interest in the lot, according to the life table, was then valued at $315.86. If this sum had been received and invested for her at 6 per cent it would have given her an annual income of $18.95, or $12 less per annum than she received in the way of rents upon her dower interest.

It is insisted for appellant that the covenant of the deed from the heirs of Thomas Cain to the Kentucky & Indiana Bridge Company, quoted in the opinion, created a trust in favor of the widow, Margaret Cain, and a lien upon the lot as security for $500, the value of the dower interest therein, which sum was retained it is claimed, by the bridge company out of the consideration for the lot. It is also insisted that the covenant obligated the bridge company to procure the relinquishment or conveyance of the dower interest of the widow in the lot upon the payment to her or her committee of its value, that the bridge company wholly failed to comply with its undertaking, and that appellee purchased and acquired title to the lot with notice of the alleged trust and lien, and by reason thereof cannot prevent the sale of the lot in satisfaction of the amount claimed by appellant as the value of Margaret Cain's dower. We think such an interpretation of the clause of the deed in question enlarges its meaning beyond what was intended by the parties; and is, besides, unwarranted by its language. Fairly construed, its meaning is that the grantors warranted the title generally, except as against the dower interest of Margaret Cain, and the language, "which claim

Digitized by Google

for dower said second party is to procure without cost to said first parties," can have no other meaning than that the title conveyed was not a complete one, that Margaret Cain was entitled to dower in the lot, and that the bridge company must procure that dower interest in its own way, if it should be asserted, without cost to the grantors. The language of the covenant does not in terms or by implication create a trust or lien, or impose upon the grantee any undertaking to compel the widow or her committee to assert her claim to dower, or to take legal steps to divest her of it. It was manifestly inserted in the deed for the protection of the grantors against liability upon their warranty, to relieve them from any and all cost that might result from the assertion of a claim to dower in behalf of the widow, or an effort by the grantor to divest her of it.

The record presents neither allegation nor proof of fraud or mistake in the language or execution of the deed as a whole, or in the particular clause under consideration. It also fails to furnish any evidence conducing to establish the alleged trust, or to prove a lien, and the claim that $500 of the consideration expressed in the deed was retained by the bridge company to satisfy the widow's claim of dower is also wholly unsupported by proof. We fail to discover in the clause of the deed copied in the opinion anything that could have apprised appellee when it acquired title to the lot of the existence of a trust or lien in favor of Margaret Cain, and it is not claimed that it otherwise received notice that the lot was charged with such trust or incumbered by lien. The deed, instead of showing the alleged lien, acknowledges the payment of the entire consideration for the lot, which indicates the non-existence of a lien. It is true it gave notice that Margaret Cain had not parted

Digitized by Google

with her dower interest in the lot at the time of the execution of the deed, but, as she died two years before appellee acquired title to the lot, and that fact was presumptively known to appellee, whatever may have been disclosed by the deed as to the dower, instead of apprising it of a secret trust or lien, if either had in fact ever existed, could have conveyed no other meaning than that Margaret Cain's claim to dower had been adjusted during her lifetime, or that it ceased at her death. Margaret Cain was, as we have already indicated, entitled to dower in the lot, of which her husband died the owner, by reason of her survivorship, and not because of the covenant contained in the deed from her children to appellee's vendor. Her dower right was not asserted, or dower assigned her during her life, and after her death it could not be asserted or enjoyed by another, as it no longer existed. The fact that she was incapacitated to assert the right by her insanity, or that no steps were taken by others (who might and ought to have acted in her behalf) to have dower asigned her, cannot alter the legal status resulting from the failure to have dower assigned. But this is not more certainly true than that the failure to assign dower did not affect the widow's right to receive one-third of the rents and profits of her husband's real estate as long as the dower remained unassigned, which, in the case at bar, was as long as she survived the husband. This she did, and the rental paid her, though small. being all that could reasonably have been demanded on that score, her administrator cannot exact more.

The conclusions expressed being decisive of the case, we deem it unnecessary to consider other questions presented by the record.

Judgment affirmed.

Digitized by Google

CASE 58.—ACTION BY J. H. ERWIN AGAINST J. RILE ALLEN AND OTHERS FOR FALSE ARREST.—January 29.

Erwin v. Allen, &c.

Appeal from Graves Circuit Court.

R. J. BUGG, Circuit Judge.

From a judgment dismissing plaintiffs petition upon plaintiffs refusal to give a bond for costs as a non-resident he appeals. Reversed.

Non-resident—What Constitutes—Action by—Bond for Costs.—Under Civil Code, section 616, requiring non-residents before commencing an action in this State, "to execute a bond for all costs which may accrue in the action," a temporary residence out of the State, even for an indefinite period, will not constitute the party a non-resident, if, at the time of departure from the State and during his absence therefrom, he has an intention of returning, and such intention may be shown by the declarations and acts of the party.

R. N. STANFIELD, attorney for appellant.

ROBBINS & THOMAS for appellees.

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

By this action appellant sought to recover of appellees in the court below damages in the sum of $3,000 for his alleged false arrest at their hands. At the appearance term, and before the case was called for trial, the court, on appellees' motion, required of appellant a bond for costs, upon the ground that he was a nonresident of the State. His refusal to give the bond resulted in the dismissal of the action by

Digitized by Google

the court. Appellant complains of the ruling of the court, and by this appeal seeks the reversal of the judgment dismissing his petition.

Except an affidavit of one of the appellees, containing a mere expression of opinion that appellant was a nonresident, which was filed as a basis for the rule to require the bond for costs, the only evidence heard on that subject was furnished by appellant, who was introduced as a witness by appellees. His testimony was as follows: "My name is J. H. Erwin. I am the plaintiff in this action. I am now working for wages at lumber work in Union City, Tenn. I went there from Graves county, Ky., about three months ago, because I had no employment here and work was so slow. I have lived in Graves county, Ky., for four years, and am a resident of that State and county. It is my intention to return, and has been, just as soon as work opens up here. I vote and pay my taxes in Kentucky, and have no intention of leaving Kentucky permanently. I own no property. My family is staying with me near Union City, Tenn.; am keeping house there. I have no property, real or personal, in Kentucky. My father-in-law also moved to Tennessee, near where I am living."

Civil Code Prac., sec. 616, requires a nonresident of this State, before commencing an action in the State, to "file in the clerk's office a bond of sufficient surety, to be approved by the clerk, for the payment of all costs which may accrue in the court in which it may be brought, or any other to which it may be carried." Section 617 provides: "An action in which a bond for costs is not given, as is required by section 616, shall be dismissed on the motion of the defendant at any time before judgment, unless in a reasonable time, to be allowed by the court, after the motion is made therefor, such bond be filed." Is the

Digitized by Google

appellant a "nonresident," in the meaning of the Code? If not, it was error to require of him a bond for costs, and equally so to dismiss the action because of his failure to give it.

It fully appears from the uncontradicted testimony of appellant that his actual residence in Tennessee was temporary, and had continued but three months; that he had previously and continuously lived in Graves county, Ky., for about four years, there voted, and paid taxes; that his only purpose in going to Tennessee was to get temporary employment, which was not then to be had at his home in Kentucky; that he left this State with the intention of retaining his citizenship therein, and of returning as soon as he could procure work at home, and such is still his purpose. The fact that his family also went to Tennessee, and have there remained with him, does not of itself prove an abandonment of his home or loss of citizenship in this State, but does conduce to prove his care of and affection for those who are dependent upon him, as he can better minister to their comfort and welfare under such circumstances than if he were separated from them. In our opinion the evidence does not prove appellant to be a nonresident, within the meaning of the section supra. In its broadest sense the term "nonresident" means one who resides out of the State; but the mere fact of being out of the State, or not domiciled therein, does not constitute one a nonresident. A temporary absence from or residence out of the State, even for an indefinite period, will not constitute the party a nonresident, if at the time of departure from the State and during the absence therefrom there is an intention of returning to it; and especially is this true if he continues to fulfil the duties of citizenship by voting, paying taxes, etc., in the state from which

Digitized by Google

which he has departed. Am. & Eng. Ency. of Law, vol. 16, p. 718; Pfoutz v. Comford, 36 Pa., 420. On the other hand, as stated in Am. & Eng. Ency. of Law, vol. 16, p. 718: "The nonresidence of a party begins as soon as he leaves the State with no present intention of returning. Indeed, it has been often considered that one's nonresidence was to be reckoned as from the time of his departure from his present place of abode with the intention of becoming a nonresident so that he may become a nonresident before he has gone beyond the limits of the State." Adams v. Evans, 19 Kan., 174.

We are aware that some of the law writers and many of the courts have drawn a distinction between a legal and actual residence. Obviously, a person cannot have a legal residence in two states at the same time; but he may have a legal residence in one state and at the same time an actual residence in another. The actual residence in the one state will not destroy the legal residence in the other, if it be but temporary and the intention to return to the state of the legal residence within a definite or reasonable time is retained; and such intention may be shown by the declarations and acts of the party. In our opinion the term "nonresident," as used in sections 616-617, Civil Code Prac., refers to and means a person whose legal residence is not in Kentucky, but another state, and that it does not include appellant, whose legal residence is in Kentucky, though he is temporarily an actual resident of Tennessee.

Our attention has been called by counsel for appellees to the case of Tipton v. Tipton, 87 Ky., 243, 10 Ky. Law Rep., 252, 8 S. W., 440, which, it is insisted, sustains the judgment appealed from. The case referred to was an action for divorce. Section 423, Civil Code Prac., provides: "The plaintiff, to

Digitized by Google

obtain a divorce, must allege and prove, in addition to a legal cause of divorce, (1) a residence in this State for one year next before the commencement of the action. * * *'' Manifestly, the word ''residence,'' in the section supra, means actual residence, and not only actual, but also of a year's duration next before the institution of the action. This was the construction given it by the opinion in Tipton v. Tipton, supra, and we do not question its correctness. We think, however, that so much of the opinion as holds that, had the appellee, Mrs. Tipton, been plaintiff in the action, she might have procured an attachment against the property of her husband upon the ground of nonresidence, and that as defendant she could have required of him a nonresident bond for costs, was not necessary to the decision of the case. Consequently we must regard these conclusions of the opinion as mere dicta.

It follows, from the foregoing expression of our views, that the lower court erred in requiring of appellant a bond for costs, and also in dismissing the action because of his failure to give it. Wherefore the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

Digitized by Google

CASE 59.—MOTION MADE IN THE COURT OF APPEALS BY THE CITY OF LEXINGTON, IN THE CASE OF BELL'S TRUSTEE AGAINST THE CITY OF LEXINGTON FOR A JUDGMENT FOR 10 PER CENT. DAMAGES ON SAID JUDGMENT WHICH HAD BEEN AFFIRMED IN THE COURT OF APPEALS.—January 29.

Bell's Trustee v. City of Lexington

On motion for damages in Appellate Court, motion overruled.

Costs—Appeal—Damages—Affirmance of Judgment.—In an action to enjoin the collection of taxes, plaintiff appealed from the judgment decreeing that the taxes were an enforceable lien, and gave a bond conditioned to pay defendant such damages as it might sustain if it should be finally decided that the injunction ought not to have been granted, as provided by Civil Code Prac., 1889, sec. 747, giving the trial court discretion to make an order pending the appeal upon such terms as to bond as may be proper. Held that, though the bond was in effect a supersedeas bond, the case did not fall within section 764, Civil Code Prac., 1902, providing that upon affirmance of an appeal 10 per cent. damages on the amount superseded shall be awarded, since that section only applies to judgments for the payment of money.

J. D. and G. R. HUNT, JOHN T. SHELBY and JOHN R. ALLEN, for appellant.

GEO. S. SHANKLIN, J. R. MORTON and GEO. C. WEBB, for appellees.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Overruling motion.

Appellant, a trustee of Clara D. Bell, sued the City of Lexington and E. T. Gross, tax collector, in the

Digitized by Google

Fayette circuit court, to enjoin the collection of taxes upon certain property owned by Miss Bell, and which had been assessed for taxation by the city. It was claimed by appellant that the property was not within the taxing jurisdiction of the city. A temporary injunction against the enforcement of the taxes was obtained in the circuit court. On final hearing that court adjudged that the taxes to the amount of $8,626.63 were legally due, and were a lien, under the terms of the statute, upon certain property owned by the taxpayer. An appeal to this court was prayed and granted. On application of the appellant, the plaintiff below, the circuit court directed that the injunction, which had been dissolved by the final judgment, be continued in force pending the appeal upon condition that the plaintiff execute bond, with approved surety, conditioned as required by subsection 3 of section 278 of the Civil Code of Practice. The provision of that subsection is, in effect, that the obligors of the bond will pay to the party enjoined such damages as he may sustain if it be finally decided that the injunction ought not to have been granted.

Upon consideration of the appeal by this court, the judgment of the Fayette circuit court decreeing that the taxes were due and payable by appellants, and constituted an enforceable lien against her property, was affirmed. Bell's Trustee v. City of Lexington, 120 Ky., 199, 85 S. W., 1081, 27 Ky. Law Rep., 591. A writ of error was sued out and prosecuted from the judgment of this court to the Supreme Court of the United States, where the judgment of this court was affirmed. Security Trust & Safety Vault Co. v. City of Lexington, 27 Sup. Ct., 87, 50 L. Ed., —. On the filing of the mandate of the supreme court in this court, appellee has moved this court to enter

Digitized by Google

judgment for 10 per cent. damages upon the judgment of the circuit court, affirmed by this court. This motion is predicated upon the contention that the stay of the execution of the judgment of the circuit court, which resulted from the order and bond executed in the circuit court continuing the injunction in force pending the appeal, was in effect and in fact a supersedeas of that judgment, and that it was a judgment for money, upon the affirmance of which, when it had been superseded, the penalty of 10 per cent. damages goes as a matter of law.

Under Civil Code Prac., 1889, sec. 747, prior to the amendment of 1894, it had been held that where an injunction was dissolved by the final judgment of the circuit court, and a supersedeas bond was executed, and supersedeas issued, upon an appeal granted to this court the injunction was thereby continued in force pending the appeal. Smith v. W. U. Tel. Co., 83 Ky., 269, 7 Ky. Law Rep., 104, 255; K. & I. Bridge Co. v. Krieger, 91 Ky., 625, 13 Ky. Law Rep., 219, 16 S. W., 824; E. R. R. Co. v. Ashland, 94 Ky., 478, 15 Ky. Law Rep., 258, 22 S. W., 855. And it was held, under Myers' Code, sec. 887, and the act of February 1, 1812, (1 Morehead & B. Dig., p. 135), which were substantially similar to the present Code provision before the amendment of 1894, that the supersedeas bond, while it stayed a judgment dissolving an injunction, did not undertake to pay the sum enjoined; but that that was covered by the injunction bond executed before the original injunction was granted and that the supersedeas bond covered only costs and damages awarded in this court. Talbott v. Morton, 5 Litt., 326; Stelle v. Wilson, 9 Bush, 699. Section 747, Civil Code Prac., 1889, was amended in 1894, so

Digitized by Google

that it now provides that the execution of a supersedeas bond and the issual of the supersedeas shall not apply to judgments granting, modifying, perpetuating, or dissolving injunctions. In lieu it is provided by the amended section that the court rendering the judgment may, in its discretion, if the ends of justice so require, at the time the appeal is taken, make an order suspending, modifying, or continuing the injunction during the pendency of the appeal upon such terms as to bond or otherwise as may be proper for the security of the rights of the other party. Other provisions of the section are not applicable to present investigation. A bond executed under this section of the Code is, in our opinion, a supersedeas bond. The purpose of the proceeding is to suspend, pending the appeal, the execution of the judgment appealed from.

Section 764, Civil Code Prac., 1902, provides, that, "upon the affirmance of, or dismissal of an appeal from, a judgment for the payment of money, the collection of which, in whole or in part, has been superseded, 10 per cent. damages on the amount superseded shall be awarded against the appellant." Construing this last section, this court has uniformly held that the 10 per cent. damages will be awarded only in cases where the judgment is for the payment of money, which may be enforced by execution or similar process. Sumrall v. Reid, 2 Dana, 65; Woods v. Rowan, 5 B. Mon., 145; Rowan's Ex'r v. Pope's Adm'r, 14 B. Mon., 102; Talbott v. Morton, supra; Steele v. Wilson, supra; Stamps v. Beaty, Hardin, 345; Leopold v. Furber, 84 Ky., 214, 8 Ky. Law Rep., 198, 1 S. W., 404; Shields v. Hinkle, 43 S. W., 485, 19 Ky. Law Rep., 1363; Hutton v. First Nat. Bank, 45 S. W., 668, 20 Ky. Law Rep., 225; Worsham v. Lancaster, 104 Ky., 814, 20 Ky. Law Rep., 969, 48

Digitized by Google

S. W., 410; Hall v. Dineen, 120 Ky., 483, 87 S. W., 275, 27 Ky. Law Rep., 886; Rennebaum v. Atkinson. 105 Ky., 396, 20 Ky. Law Rep., 1346, 49 S. W., 1, 342. The amendment to section 747 Civil Code, does not change the provision of section 764, nor affect the decisions construing the latter. The judgment in the case at bar was not for the payment of money, which could have been enforced by execution or similar process. A tax is not a debt. A judgment decreeing, its enforcement against specific property is not a personal judgment against the taxpayer. Hence the 10 per cent. damages allowed by section 764, Civil Code Prac., do not attach.

This was not a proceeding to enjoin a judgment, allowed by section 278 of the Civil Code of Practice. The reference to that section in the order of the circuit court was merely to indicate the terms of the bond which was required in order to continue the injunction in force pending the appeal. As the proceeding was not to enjoin the collection of a judgment, as defined and allowed by section 278 of the Civil Code of Practice, the further provisions of section 295, Civil Code of Practice directing that upon the dissolution of such injunction the damages must be assessed by the court, which may hear evidence and impanel a jury, obviously do not apply to the practice in this court upon the dissolution upon appeal of an injunction granted by the judgment of a circuit court. Such damages as may have been sustained by appellees by reason of the stay of the execution of the judgment appealed from are recoverable in any court of original jurisdiction which may properly take cognizance of an action upon the bond.

The motion of appellees to adjudge 10 per cent. damages against appellant is overruled.

Digitized by Google

CASE 60.—ACTION BY THE COMMONWEALTH FOR THE USE OF MRS. DEVOE AGAINST JOHN F. BASKE, SHERIFF OF KENTON COUNTY, AND OTHERS TO RECOVER TAXES PAID.—January 30.

124 468
f129 432

124 468
f133 433
133 435

124 468
132 746

Commonwealth, for Use of Devoe, v. Baske, &c.

Appeal from Kenton Circuit Court.

W. McD. SHAW, Circuit Judge.

Judgment for defendants. Plaintiffs appeal. Affirmed.

Counties—Action by Tax Payer—Taxes Illegally Collected—Remedy.—Counties are subordinate subdivisions of the State and are not liable to suit unless authority can be found for it in the statute or it follows by necessary implication from some express power given. Where taxes have been wrongfully collected by county officials and are in hands of the collecting or disbursing officers, a direct action may be brought by the tax payer against the person holding the tax, but after the taxes collected have been paid out the tax payer is without remedy as against the county.

A. G. SIMRALL, attorney for appellants.

SUMMARY.

1. The tax levies for which refunder is sought in this case, being illegal and void, being paid under compulsion of distraint and arbitrary sale, can be recovered back. (Fecheimer Bros. v. Louisville, 84 Ky., 306; Louisville v. Anderson, 79 Ky., 339; City of Covington v. Powell, 2 Met., 226; Brands v. Louisville, 23 Ky. Law Rep., 444; L. & N. R. R. Co. v. Hopkins, 87 Ky., 613; Bank v. Coulter, Auditor, 23 Ky. Law Rep., 1883; Same v. Same, 23 Ky. Law Rep., 1888.)

2. The Fiscal Court, being a de facto, as well as a de jure

Digitized by Google

body, acting through a quorum of five magistrates, and the county judge, whose title to seats in the fiscal court was never questioned, has full authority in law, to make the levies, and having made them illegally, they should be refunded. (Sec. 1837, Kentucky Statutes; Lewis v. Brodenborg, 20 Ky. Law Rep., 1016; Heiskill v. Mayor, 65 Md., 125; Rushville Gas Co. v. Rushville, 121 Ind., 206; Beach Public Corporations, vol. 1, page 692; Morton v. Youngerman, 89 Ky., 595; Am. & Eng. Ency. of Law, vol. 23, page 591 (New Ed.); Bybee v. Smith, 22 Ky. Law Rep., 1684; McGuire v. Justices, &c., 7 B. Mon., 340; Graham v. Blount, 12 B. Mon., 243.)

3. In the absence of anything to the contrary, the law presumes that a court or municipal body having authority to make tax levies, proceeds with a legal and properly constituted body, and upon proper principles in making the levy. (McGuire v. Justices of Owsley, 7 B. Mon., 340; Graham v. Blount, 12 B. Mon., 243; Am. & Eng. Ency. of Law, vol. 21, page 798, New Ed.)

4. For principles decided in the Richardson case, see: (Richardson v. Boske, 23 Ky. Law Rep., 1213; Huelefield v. McInerney, 25 Ky. Law Rep., 274.)

5. The funds collected having been paid over to the county, and having been by it, used in defraying all the governmental expenses of the county, the county is alone responsible for a refunder. (See cases cited under Section 1, Summary.)

FURBER & JACKSON, attorneys for appellants.

POINTS AND AUTHORITIES CITED.

Richardson v. Boske, decided October 31, 1901, 23 Ky. Law Rep., 1209.

1. Right of appellant to sue for all taxpayers similarly situated. (Civil Code or Practice, section 25; Whaley v. Commonwealth, 110 Ky., 154, etc.; Commonwealth, use, &c., v. Scott, &c., 112 Ky., 252, &c.)

2. Trust Fund. (Louis & Mason Turnpike Road Co. v. Thomas, 8 Ky. Law Rep., 872; McMann v. City of Louisville, 23 Ky. Law Rep., 558; Civil Code of Practice, section 25, page 559.

3. Leave of Court. (Bliss on Code Pleadings ,section 81; Flint v. Spurr, vol. 17 B. Monroe, p. 513; Bardstown & Louisville R. R. Co. v. Metcalfe 4 Metcalf, p. 200; Kinkaid on Code Pleading, section 15, p. 307; Ohio Statutes, section 5008. Platt, &c. v. Colvin, et al., 50 Ohio State, 707, etc.)

4. Injunction to prevent other parties from suing. (Spelling on Injunction, section 61; Erie Railway Co. v. Ramsey, 45 N. Y., 637; Willard on Eq. Jurisp., p. 401; Pomeroy on Eq. Jurisp.,

Digitized by Google

section 1345; Blair v. Carlisle & Jackson Turnpike Co., 4 Bush 157; Whaley v. Commonwealth, use, &c., 23 Ky. Law Rep. 1292, 1295; Commonwealth, use, &c., v. Scott, 23 Ky., 1488, 1493.)

5. Who should appellant have sued? (Pomery on Eq. Jurisp., section 245, paragraph 4; Civil Code of Practice, section 25.)

6. Right to Recover taxes illegally collected. (Richardson v. Boske, 111 Ky., 895, 23 Ky. Law Rep., 1209; 23 Ency. of Law, 2nd Ed., p. 590, 591, and cases cited; Huelefeld v. McInerney, Sheriff, 25 Ky. Law Rep., 272.)

7. The taxes can be collected back. (City of Louisville v. Anderson, etc., 79 Ky. p. 334, etc.; City of Louisville v. Scherle, 80 Ky., p. 71; Louisville & Nashville R. R. Co. v. Hopkins county, 87 Ky., p. 605, etc.; Titus v. Rochester German Ins. Co., 97 Ky., 567; City of Maysville v. Melton, 102 Ky., 72; Burr v. Town of Stanton, 102 Ky., 462; Whaley, et al. v. Commonwealth, 110 Ky., 154; Commonwealth v. Scott, 112 Ky., 252.)

8. De factor officers. (Hildreth v. McIntyre, 1st J. J. Marshall, 206.)

9. Estoppel. (8 Ency. of Law, 784, etc.; 26 Ency. of Law, 534.)

10. The county liable. (McCann v. City of Louisville, 23 Ky. Law Rep., 588.)

R. S HOLMES, attorney for appellants, Wallace, &c

AUTHORITIES CITED.

City of Maysville v. Melton, 102 Ky., 79; City of Louisville v. Anderson 79 Ky., 334; Fechmier Bros. v. Louisville, 84 Ky., 306; Brands v. Louisville, 23 Ky. Law Rep., 444; L. & N. R. R. Co. v. Hopkins, 87 Ky., 613; Bank v. Coulter, 23 Ky. Law Rep., 1383: City of Covington v. Powell, 2 Metc., 226; Richardson v. Boske, 123 Ky. Law Rep., 1213; Section 141, Constitution; McGuire v. Justices of Owsley county, 7 B. Mon., 340; 1st Dillon on Municipal Corporations, 276; Lewis v. Brandenburg, 20 Ky. Law Rep., 1016.

FRANK M. TRACY for Kenton County.

CLASSIFICATION UNDER RULE XVII.

1. The so-called Fiscal Court, as it existed prior to 1902, was an absolutely illegal and void body. (Constitution, section 144; Kentucky Statutes, section 1833; Richardson v. Boske, 23 Ky. Law Rep., 1209; Huelefeld v. McInerney, 25 Ky. Law Rep., 272.)

2. Being without constitutional or statutory authority for its existence, this so-called Fiscal Court could not be "de jure" the Fiscal Court of Kenton county. There can be no such thing as a de

Digitized by Google

facto Fiscal Court; consequently the acts of the usurping board are void, and of no binding effect on Kenton county. (Hildreth v. McIntire, 1 J. J. Marsh., 206; Norton v. Shelby County, 118 U. S., 425; Town of Decorah v. Bullis, 25 Iowa, 12-18; Re Hinkle, 31 Kan., 712; Herrington v. State, 103 Ga., 318; State v. McFarland, 25 La. Ann., 547; Cheever v. Duffell, 32 La. Ann., 650; Heinze v. People, 92 Ill., 406; Town of Lewiston v. People, 23 Ill., 483; Carlton v. People, 10 Mich., 250; Ex Parte Snyder, 64 Mo., 58; State v. O'Brien, 68 Mo., 153; Ayres v. Latimer, 57 Mo. App., 78; Flaucher v. Camden, 56 N. J. L., 244; Re Quinn, 152 N. Y., 89; Strickland v. Griffin, 70 Ga., 546; Hower v. Seldenridge, 2 W. Va., 274-283; Dillon on Municipal Corporations, sec. 276.-

3. The fact that the country magistrates (being five in number) constituted a majority of the constitutional court, did not make their acts binding. These magistrates did not claim merely that they constituted a majority of the court, they contended that they were the court itself, and so acted.

4. The illegal taxes were never received by Kenton county, hence it cannot be required to refund what it never received. (Cooley on Taxation, (3rd Ed.), 1489.)

5. If appellants have a claim at all, it is against the sheriff who collected the taxes, and not against Kenton county. (Whalley v. Commonwealth, 110 Ky., 154; Commonwealth v. Stone, 24 Ky. Law Rep., 1297; Insurance v. Herrott, 109 Iowa, 606-615; Wood v. Sturman, 27 Texas, 584.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

In Richardson v. Boske, 64 S. W., 919, 23 Ky. Law Rep., 1209, which was a suit by certain taxpayers of Kenton county residing outside of the corporate limits of the City of Covington to enjoin the sheriff from collecting taxes levied upon their property by the fiscal court of Kenton county, this court held that the injunction prayed for should have been granted, resting its opinion upon the ground that the fiscal court was composed of all the magistrates in the county of Kenton, seven in number, and that the taxable property of the entire county, including that situated within the corporate limits of the City of

Digitized by Google

Covington, as well as that without, was liable for its proportionate part of the taxes imposed for county purposes; whereas, the tax sought to be enjoined was levied by the five justices of the peace who resided outside the corporate limits of the City of Covington, the two justices residing in the city not taking any part in making the levy, which was only imposed upon the property outside the City of Covington, thereby exempting from the tax levied two-thirds of the property of the county, and imposing upon the one-third a burden that should not be borne by all of it. This opinion was approved in McInerney, Sheriff, v. Huelfield, 116 Ky., 28, 75 S. W., 237, 25 Ky. Law Rep., 272. After the rendition of these opinions, the appellant Mrs. Devoe brought this suit against the sheriff and his sureties, the county judge, and the members of the fiscal court, the treasurer of the county, and the county of Kenton, alleging, in substance, in the petition as amended that she had been for five years the owner of $40,000 worth of property situated in Kenton county outside of the city, which was assessed for taxation for state and county purpose for the years 1898 to 1901 inclusive, and that during these years the county judge and the five justices of the peace who were elected from and resided outside of the City of Covington acted as the fiscal court of Kenton county, the two justices located within the city not acting with the fiscal court as above composed; that the county judge and the five magistrates levied a tax upon all the property in the county outside of the City of Covington, for each of said years, to raise funds to pay the salaries of the county officers, and for road and bridge purposes, no part of said taxes being levied upon property situated within the city; that for the years named the assessed valuation of the property in the city was about three-

Digitized by Google

fourths of the entire assessment of the county, and that all the property in the county within and without the city was liable for its ratable proportion of the expense of defraying the salaries of the officers and for the maintenance of the roads and bridges; and that by reason of the imposition of this entire tax upon the property outside of the city, property, so situated was burdened with taxes grossly in excess of its just and legal proportion. She further averred that the taxes were involuntarily paid, being coerced by threats of levy and distraint, and paid in ignorance of her legal rights; that the levies made by the fiscal court as so constituted and in the manner stated were illegal; that the money collected, except a small portion of same had been paid by the sheriff to the county of Kenton, or its treasurer, and expended for the use and benefit of the persons and funds for which it was imposed. She asserted that the taxes so illegally collected constituted a trust fund for the benefit of the persons from whom it had been wrongfully exacted. She prayed for judgment in her own behalf for $700, the amount of taxes illegally exacted from her, and judgment in behalf of each of the other taxpayers similarly situated, and asked that the case be referred to the master commissioner to ascertain and report the amount illegally collected, and from whom, and in whose hands, the fund was, or what disposition was made of the money collected. A number of other taxpayers filed intervening petitions in the case, setting up substantially the same state of facts as appellant, asking the same relief. On motion of defendants, now appellees, the lower court required the plaintiff to elect which of the parties they would prosecute the action against. They elected to prosecute against the county of Kenton, and thereupon a demurrer was sustained to

Digitized by Google

the petition, and, declining to plead further, the case is brought here.

It is not seriously insisted by appellants that they have any valid claim against any of the defendants except the county of Kenton. Therefore, we will consider the question as if it were a suit by appellants against the county of Kenton alone. Indeed, no appeal is regularly prosecuted except from the order sustaining the demurrer of Kenton county to the petition as amended. Can a taxpayer maintain a suit against a county to recover taxes illegally and wrongfully exacted by the officers of the county after the taxes have been paid out by the disbursing officers of the county? We think not. It is a well-established doctrine in this State, and in harmony with the rule generally prevailing, that counties are not liable to suit, unless authority for it can be found in the statute, or it follows by necessary implication from some express power given. The reason upon which this rule rests is that counties are subordinate political subdivisions of the State. They are created for public purposes, and are a part of the necessary machinery of government, and can no more be sued by the citizen than can the State. Downing v. Mason County, 87 Ky., 208, 10 Ky. Law Rep., 105, 8 S. W., 264, 12 Am. St. Rep., 473; Wheatley v. Mercer County, 9 Bush, 704; Hite v. Whitley County, 91 Ky., 168, 12 Ky. Law Rep., 764, 15 S. W., 57, 11 L. R. A., 122; Simons v. Gregory, 85 S. W., 751, 27 Ky. Law Rep., 509; Sinkhorn v. Lexington T. P. Co., 65 S. W., 356, 23 Ky. Law Rep., 1479. It is true that in these cases damages were sought to be recovered for injury to person or property, but the principle announced, and the ground upon which the opinions rest, is that, in the absence of statutory authority or necessary implication flowing from the exercise of a power granted,

Digitized by Google

an action against a county will not lie. We have not been able to find any authority in the statute for an action such as this. In fact, there are very few actions that can be maintained against counties. The right of these political subdivisons of the State to sue is much larger than their right to be sued, and this follows from the fact that, having control of the bridges, highways, and public buildings of the county, it is necessary that they should be invested with all needful power to protect and preserve them, and so it has been held that a county may maintain an action for injury to its courthouse or public roads. Christian County v. Rafton & Tharp, 2 Duv., 503, 87 Am. Dec., 505; Lawrence County v. Chattaroi R. Co., 81 Ky., 225, 5 Ky. Law Rep., 36; L. & N. R. R. Co. v. Whitley County, 95 Ky., 215, 15 Ky. Law Rep., 734, 24 S. W., 694, 44 Am. St. Rep., 220. And where a county has authority to make a contract, it would follow as an incident that it might sue or be sued concerning it. There is a marked distinction between counties and municipal corporations, such as cities and towns, in respect to the power to sue and be sued. The latter, by the act creating them, are expressly authorized to sue and be sued; and hence may be parties plaintiff or defendant in any case in the absence of a statute or judicial determination to the contrary, and it has been frequently announced that an action against them will lie in behalf of a taxpayer. City of Covington v. Powe, 2 Metc., 226; City of Louisville v. Anderson, 79 Ky., 334, 2 Ky. Law Rep., 344, 42 Am. St. Rep., 220. When taxes have been wrongfully collected by county officials, and are in the hands of the collecting or disbursing officers, a direct action may be brought by the taxpayer against the person holding the tax. Whaley v. Commonwealth, 110 Ky., 154, 23 Ky. Law

Digitized by Google

Rep., 1292, 61 S. W., 35; Blair v. Carlisle, etc., Turnpike Co., 4 Bush, 157; Commonwealth v Stone, 114 Ky., 511, 71 S. W., 428, 24 Ky. Law Rep., 1297. But after the taxes collected have been paid out, the taxpayer is without remedy as against the county.

We conclude, therefore, that the action of the lower court in sustaining the demurrer in behalf of Kenton county was proper, and the judgment is affirmed.

Petition for rehearing by appellant overruled.

CASE 61.—ACTION BY LEXINGTON BREWING CO. AGAINST GOODE & CO. TO RECOVER THE PRICE OF BEER SOLD.—January 30.

Lexington Brewing Co. v. Goode & Co.

Appeal from Lincoln Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for plaintiff, for reduced sum and he appeals. Reversed as to attachment.

1. A verdict as to the amount due for goods purchased, based on conflicting evidence, will not be disturbed on appeal.
2. Attachment—Quashing Grounds.—In an action to recover for beer sold, a firm of saloon keepers, defendants were proved to be insolvent, and neither the firm nor the individual members had any property subject to execution, except their stock of liquors and saloon fixtures, which were attached on the ground that defendants had not enough property to satisfy the demand and the collection of it would be endangered by delay in obtaining judgment and a return of "No property found." At the sale by the sheriff the stock and fixtures brought $327, and plaintiff recovered a verdict of $476. Held, that it was error to discharge the attachment.

Digitized by Google

3. Same—Evidence.—In proceedings to discharge an attachment on a saloon stock and fixtures on the ground that they were insufficient to pay the debts of defendant, evidence as to what the stock would bring at retail is inadmissible, the issue being as to the value at a sale made at once; and evidence as to the value of licenses was inadmissible, as they were not subject to execution.

GEORGE D. FLORENCE AND T. J. HILL for Appellant.

POINTS AND AUTHORITIES.

1. Affidavit for attachment.—If the petition state facts and be sworn to, a separate affidavit is unnecessary. (88 Ky., page 108, 17 B. M., page 321.

2. Amendment of affidavit.—A plaintiff may by an amended affidavit cure a defect in the affidavit upon which he obtained an attachment, and may thus acquire a lien on the attached property if the proceedings conform to law in other respects. (Civil Code, section 268, sub-section 2.)

3. Valuation.—It was error to allow defendants to show what the attached property would have brought had it been sold by retail over the counter as in the ordinary course of trade. The value at which property would sell under execution is the true criterion in such cases. (19 Ky. Law Rep., page 1005, 12 Ky. Law Rep., page 300.)

C. C. BAGBY and J. S. OWSLEY for Appellees.

We hold that to make use of, the ordinance, it must be incorporated in the bill of exceptions as signed, or, if it be manuscript evidence by special order of the court. That which purports to be the bill of exceptions and is signed by the judge, simply refers to the evidence and states that it makes it a part of the bill of exceptions. It cannot be so embraced, but must be incorporated in the bill of exceptions and signed by the judge. The depositions of appellant were not made part of the bill of exceptions, either by embodying them therein, or by an order of Court.

AUTHORITIES CITED.

Civil Code, sec. 337, sub-sec. 2; Rapp v. Shoemaker, 11 Rep., 401; Stewart v. Petitt, 15 Rep., 654; Helm v. Coffee, 80 Ky., 176; Miles v. Saunders, 8 R., 689; Civil Code, sub-sec. 2 of sec. 194; Civil Code, sec 732, sub-sec. 24; Civil Code, sec. 116; Allen v. Puryear,

Digitized by Google

9 R., 356; Reitz v. McPherson, 10 R., 283; Polly v. City of Covington, 10 R., 361; Owsley v. Callahan, 4 Rep., 359; L. S. R. R. Co. v. Miller, 13 Rep., 830.

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

The appellant, the Lexington Brewing Company, is a corporation in Lexington, Ky., engaged in the business of brewing and selling beer. W. B. Goode and Charles M. Rice were partners, carrying on a saloon business under the firm name and style of Goode & Co., in Stanford, Ky. The appellant instituted this action against the appellees to recover the sum of $1,120 alleged to be due it for beer sold and delivered to them. As an ancillary remedy, it sued out a general attachment against the property of the appellees, on the ground that they had not enough property in this State, subject to execution, to satisfy the demand, and that the collection thereof would be endangered by the delay in obtaining a judgment and a return of "No property found." The appellees placed in issue all of the claim of appellant except $418, and controverted the grounds of the attachment. A trial by jury resulted in a verdict in favor of appellant for $476, and the trial court sustained appellee's motion to discharge the attachment. Of both these results the appellant complains on this appeal.

Without going into the evidence as to the amount due the appellant with any great particularity, it may be stated that it was conflicting on the subject, and the jury found that only $476 was due, and that we do not feel at liberty to set aside the verdict of the jury. But on the correctness of the ruling of the trial court in discharging the attachment we are

Digitized by Google

of opinion that appellant has just cause to complain. The appellees were hopelessly insolvent, and to meet their indebtedness only had the fixtures in their saloon and the stock on hand. Neither the firm nor the partners had any other property subject to execution. There was a good deal of testimony taken on the motion to discharge the attachment; but we think the weight of it was with the appellant, and that the court erred in allowing the appellees to testify, and to introduce other witnesses to testify, as to what the stock on hand could be sold for by the drink. This was not the question before the court. To sell out the stock on hand by retail would involve carrying forward the business, the hiring of bartenders, the payment of rent, the making of bad debts, and all the contingencies of a retail liquor dealer's business. The real question was the value of the stock on hand and the fixtures at a fair, voluntary sale made at once. Nor do we think the value of the licenses—State and city—should have been considered. These were not subject to execution, and therefore the question of their value should have been eliminated from the court's inquiry. At the sale by the sheriff the whole property brought the sum of $327. Taking this, together with the evidence of appellant's witnesses, we think the property owned by appellees at the time the attachment was sued out, and which was subject to execution, was less than $476, and the collection of the claim would have been endangered by the delay in obtaining judgment and the return of "No property found."

The judgment, in so far as it discharged the attachment sued out by appellant, is reversed, with directions to enter an order sustaining the attach-

Digitized by Google

ment, and for further proceedings consistent herewith.

Petition for rehearing by appellee overruled.

CASE 62.—ACTION BY SAMUEL WESTHEIMER & CO., AGAINST M. H. FLARSHEIM & CO. AND OTHERS FOR BALANCE DUE ON INDEBTEDNESS.—January 30.

Westheimer & Co. v. Flarsheim & Co. &c.

Appeal from Jefferson Circuit Court; Common Pleas Branch (Second Division).

THOS. R. GORDON, Judge.

From a judgment dismissing the petition plaintiff appeals. Affirmed.

Insolvent Debtors—Settlement of Estates—Release by Creditor—Agreement With Debtor—Action to Enforce.—A statute of Minnesota provides, in substance, that "no creditor of an insolvent debtor shall receive any of the proceeds of the debtor's estate unless he files with the clerk of the court a release to the debtor of all claims therein other than such as may be payable under the provisions of the act." It was agreed by an insolvent debtor in said State, that if a certain creditor would file his claim under said act and receive his pro rata share of the debtor's estate that he would thereafter pay the balance of his claim, with interest, as soon as he could. In an action in this State to enforce said agreement, held—that it was not founded upon sufficient consideration, was fraudulent and not enforcible.

W. M. SMITH for Appellants.

We contend:—

1. That the debtor promised to pay plaintiffs an additional

Digitized by Google

amount when able, does not concern the other creditors or affect the pro rata, as that is determined alone by the court, and the discharge from the debts, in no event is dependent upon same.

2. It cannot be urged that the plaintiffs might not have filed their claim except for the new promise, because the right to file or not is absolute and unconditional, and the other creditors have no rights to same, and consequently no matter what action is taken they cannot be prejudiced.

3. The discharge of the original debt herein, was by operation of law, and the same moral obligation to support a new promise still exists, as in case of discharge under the National Bankruptcy Act.

ALFRED SELLIGMAN, Attorney for Appellee.

POINTS MADE AND AUTHORITIES CITED.

1. Westheimer & Co. sued Flarsheim upon an alleged new promise, to pay when able, the balance of a debt which the petition alleges was discharged after the making of the said promise, in a proceeding under the Minnesota Insolvency laws.

2. The Minnesota Insolvency laws provide that any creditor proving his claim in the proceedings shall not share in the benefit of the proceeding, or receive any share of the proceeds of the debtor's estate, unless he shall give a release to the debtor of all claims other than such as may be paid under the provisions of said Act. This release Westheimer gave to Flarsheim and the judgment in the insolvency proceeding discharged Flarsheim of all claims owing to Westheimer other than such as may be paid under the provisions of said Act.

(a) Westehimer claims that anterior to the filing of the claim and before the entry of the judgment, and while Flarsheim's original obligation was valid, binding and enforcible, Flarsheim promised to pay, when able, the balance of this claim after crediting dividends thereon.

3. The discharge of Flarsheim was by voluntary act of the creditors, including Westheimer, who joined in the insolvency proceedings, and unless some new and valuable consideration passed, the promise was nudum pactum and uninforcible. (Denny v. Bennett, 128 U. S., 489; Union Bank v. Rugg, 78 Minn., 262.)

(a) This is to be distinguished from a discharge by operation of law, to which the creditor has not voluntarily assented. (Egbert v. McMichael, 9 B. Mon., 44; Bigler v. Crigler, 7 Ky. Law Rep., 662; Duff v. Higgins, 8 Ky. Law Rep., 358; Doom v. Snyder,

Digitized by Google

10 Ky. Law Rep., 281; Jones v. Talbot, 13 Ky. Law Rep., 303; Eckler v. Gailbraith, 12 Bush, 72; Brooks v. Payne, 25 Ky. Law Rep., 25; Kimball v. Coon, (Minn.) 47 N. W. Rep., 315; Higgins v. Dale, 9 N. W. Rep., 583; National German Am. Bk. v. Wilder, 27 N. W., 201; In re Gazette, 29 N. W. Rep., 347; Montgomery v. Lampton, 3 Met., 519.)

4. Even if this case falls within the rule respecting discharges by operation of law, the promise was made before the discharge and while the original debt existed, and no action can be maintained thereon. (Gilmore v. Green, 14 Bush, 774; Hopkins v. Stout, 6 Bush, 375; Carr v. Robinson, 8 Bush, 274; Trousdale v. Anderson, 9 Bush 277; Ogden v. Redd, 13 Bush, 581; Thornberry v. Dils, 80 Ky., 242; Meyer v. Zodel's Admr., 96 Ky., 363; Graves v. Meguire, Helm & Co., 79 Ky., 532.)

5. The new promise having been made before Westheimer filed their claim in insolvency proceedings, any liability on the new promise itself was discharged because thereafter Westhemier filed in said proceedings a claim, and a "judgment was entered in said proceedings discharging the insolvent from all claims due participating creditors except to dividends. (Kimball v. Coon, 47 N. W. Rep., 315.)

6. Payments subsequent to the discharge will not avail either to establish a new promise or to revive the debt. (Toole v. Smith's Exrs., 98 Ky., 466; Chism v. Barnes' 104 Ky., 317.)

7. The alleged agreement, to-wit, to pay a dividend to creditors and apply it to reduce a claim which was to be secretly paid, was upon fraudulent consideration and will not support a cause of action.

8. This action is in effect a collateral attack upon the judgment in the insolvency proceedings, and cannot be maintained. (Ewell v. Pitman, 16 Ky. Law Rep., 299; 27 S. W. Rep., 817.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

Previous to the year 1890 the appellees became indebted to appellants in the sum of $1,218. In the latter year appellees, who were then residents of Minnesota, became insolvent, and took the benefit of the law of that state authorizing assignments for the benefit of creditors. So much of this law as is pertinent to this case reads as follows: "No creditor of

Digitized by Google

any insolvent debtor shall receive any benefit under the provisions of this act, or any payment of any share of the proceeds of the debtor's estate, unless he shall have first filed with the clerk of the district court in consideration of the benefits of the provisions of this act a release to the debtor of all claims other than such as may be payable under the provisions of this act for the benefit of such debtor; and thereupon, the court or judge may direct that judgment be entered, discharging such debtor from all claims or debts held by creditors who shall have filed such release." Gen. St. Minn., 1891, sec. 4268. The petition filed by appellants against appellees avers that "at the time of the institution of the proceedings by the defendants under said assignment statute no part of the indebtedness due them had been paid, and plaintiffs had not proven up their claim in said assignment proceedings; that thereupon the defendants then agreed and promised said plaintiffs that they would pay said claim with interest as soon after the determination of the assignment proceedings as they were able, provided the plaintiffs would prove up their said claim in said assignment proceedings so as to reduce same to the extent of the pro rata distribution thereunder; that thereupon, and by reason of said agreement and promise aforesaid, and relying upon same, plaintiff did prove up their said claim in said assignment proceedings, and upon the distribution of the estate in said proceedings received upon their claim the sum of $500; that by reason of said agreement and promise aforesaid plaintiffs, accepting and relying upon same, did prove up said claim against defendants, and by reason of the judgment of the court by operation of law the original indebtedness was discharged, all of which facts were at the time known to said defendants; that thereafter,

Digitized by Google

and after the determination of said assignment proceedings, the defendants did again ratify and confirm said promise and agreement by paying to plaintiffs under said promise and agreement on said indebtedness divers sums, amounting to $171," and they sought judgment against appellees for the balance due on their claims. The trial court sustained a demurrer to the petition as amended, and plaintiffs below, now appellants, declining to plead further, their petition was dismissed, and they appeal.

Several interesting questions are discussed in the well-written briefs of counsel representing the parties to this controversy, but we do not deem it necessary to consider but one of the questions made, as that is conclusive of the correctness of the ruling of the lower court. It will be observed that the basis of appellants' claim is the alleged promise of appellees that, if appellants would present their claim in the assignment proceedings, appellees would pay the remainder of the claim after appellants had received their pro rata part of the distribution made in the assignment proceedings, and that induced by this promise, and relying upon the same, appellants did prove up their claim, and did receive the same as other creditors their distributable share of the estate. The foundation of this agreement was a fraud. Aside from this, it was not founded on a sufficient consideration, and the court will not lend its aid to its enforcement. Under the statute a creditor who did not submit himself to the jurisdiction of the court by presenting his claim could not receive any part of the assigned estate, and when a creditor did file his claim with the clerk of the district court the effect was to release the debtor of the entire debt, except so much thereof as might be paid in the assignment proceedings. Therefore, if no agreement had been

Digitized by Google

made, and appellants had filed their claim and received their portion of the debtor's estate, he was released from all liability for the balance of the claim. The law does not require a creditor to file his claim. It is optional with him whether he does so or not. If he does file it, he gets his pro rata share of the proceeds in satisfaction of his debt. If he does not present his claim, he receives no part of the debtor's estate distributed in the proceedings, but is not estopped from afterwards collecting, if he can, his debt. The purpose of the agreement made between these parties was to evade the statute, and to escape the effect of its provisions. It also gave appellants an advantage over the other creditors, because the amount appellants received in the distribution reduced to that extent the amount other creditors would have received, and at the same time did not prejudice appellants, as under the agreement, if enforceable, appellees were obliged to pay the balance due, whatever it might be. To uphold and sanction a transaction like this would be to offer a premium upon practices that would enable one creditor, without diminishing his claim or right to collect, to take away from other creditors part of a fund, to the whole of which, in good faith, they were entitled. The creditors of appellees had no notice of this arrangement, and it is to be presumed that the court in which the proceeding was had was ignorant of it.

Counsel for appellants undertake to distinguish this case on the point under consideration from the general rule relating to the composition of debts, conceding that in ordinary cases of composition or accord and satisfaction such an agreement as the one here made would be a fraud upon the rights of the other creditors, and unenforceable, but insisting that

Digitized by Google

here the debts are released by operation of law; the pro rata being determined by law, and not by the creditor, and the right to file or not file a claim being entirely optional with the creditor. We are unable to perceive the distinction sought to be made by counsel. Technically there may be one, but in sound reason there is not. In our opinion the debtor is discharged under this statute, not by operation of law, but by the voluntary act of the parties. The creditor must determine for himself whether or not he will be a party to the proceedings. The law does not require him to come in, nor does his failure to do so discharge his debt. But, if he voluntarily submits himself to the jurisdiction of the court he accepts in full satisfaction of his claim the distributable share of the assets paid to the creditors. There is a marked distinction between this statute and the United States bankruptcy act. Act July 1, 1898, c. 541, 30 Stat., 544 (U. S. Comp. St., 1901, p. 3418). Under the latter act the creditor has no election. If his claim is scheduled by the debtor, or he has notice of the procedings, the adjudication operates as a discharge. The wishes of the creditor are not consulted. Hence it may well be said that the debtor is released by operation of law. When the appellants filed their claim, the other creditors had the right to believe that they were in good faith under the statute attempting to secure and receive their pro rata part of the assigned estate, and that this was the only motive that prompted them to file it. Therefore it is manifest that the debtor, when he induced them to file their claim and get their pro rata in the distribution, obligating himself to pay the balance due, was giving them a preference and an advantage that they would not have had except for this agreement. The debtor may have had some

Digitized by Google

reason for desiring to pay these creditors in full, and for the purpose of reducing their claim as much as possible he desired them to get what they could out of his general estate set apart for the benefit of all his creditors. Except for the agreement made, they would not have presented their claim, and the other creditors would have received a larger pro rata. It is said, however, that the other creditors are not and have no right to complain. Be this as it may, before appellant can recover he must show that the new promise upon which he relies to support his action is based upon a sufficient consideration. Upon this question it is sufficient to say that as the discharge was not by operation of law, but resulted from the voluntary act of appellant, it is well settled that a promise to pay is not enforceable. As said in Montgomery v. Lampton, 3 Metc, 519: "Where a debtor has been discharged from the debt by provision of positive law, an express promise afterwards to pay the debt will be enforced, but, where the discharge is the fair, voluntary act of the creditor, a subsequent express promise to pay the debt will not be enforced."

The judgment of the lower court is affirmed.

Digitized by Google

CASE 63.—ACTION BY N. M. FORD'S ADM'R AGAINST THE PADUCAH CITY RAILWAY FOR DAMAGES FOR CAUSING THE DEATH OF PLAINTIFFS INTESTATE.—January 30.

Ford's Adm'r v. Paducah City Railway

Appeal from McCracken Circuit Court.

W. M. REED, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Affirmed.

1 Street Railroads—Negligent Killing—Speed of Car—Expert Evidence.—On the trial of an action against a street railroad for damages for the alleged negligent killing of one on its track, it was not error in the court to refuse to permit the plaintiff to show by expert street car operators, what would be a safe and reasonable rate of speed for a car while being operated over a street at the point where the injury occurred.

2. Same—Question for Jury.—On a trial for damages for the negligent killing by a street car of one on the track of the company, where it was proven the speed at which the car was running at the time, the condition of the street, the extent and purpose for which it was used by the public; with these facts before the jury it was for them to say whether the car was travelling at a dangerous rate of speed.

3. Same—City Ordinance—Regulating Speed of Cars—Evidence. —The violation of a city ordinance regulating the speed of street cars, is of itself no evidence of negligence on the part of the street car company, and such ordinance is not competent evidence of negligence.

4. Negligence of Motorman—Appearances—Killing Deaf Man—Reasonable Precautions.—Where the motorman of a street car saw a man on the street, approaching the track some distance ahead, and at once sounded his gong and hallooed at the man, he was not required to stop his car, but had the right to assume that the man would not come upon the track

Digitized by Google

until it became reasonably apparent to him that he was not going to get out of his way. After making this discovery it was then his duty to use all means in his power, to avoid injuring him. And the fact that the injured man was deaf, which was not known to the motorman, did not add to the motorman's responsibility.

J. M. WORTEN Attorney for Appellant.

AUTHORITIES CITED.

1. On admission of expert testimony. (L. & N. R. R. Co. v. Scott's Administrator, 22 Ky. Law Rep., page 30. (Latter part of decision.); Standard Oil Co. v. Tierney, 16 Ky. Law Rep., page 327; Claxton's Ad'mr v. Lexington & Big S. R. R. Co., 13 Bush, page 636. (Latter part of decision.)

2. On admission of speed ordinances. (Southern R. R. Co. v. Wood, 21 Ky. Law Rep., page 575; L. & N. R. R. Co. v. Dalton, 19 Ky. Law Rep., page 1318; Dolfinger & Co. v. Fishback, 12 Bush, page 474; Mahoney v. Dankart, 6 Am. Neg. R., 278, (Iowa); East St. L. L. C. R. Co. v. Reams, 4 Am. Neg., 471, (Ill.); Chicago & Alton R. R. Co. v. O'Neil, 4 Am. Neg. R., 262, (Ill.); Missouri Pacific Ry. Co. v. Chick, 3 Am. Neg. R., 380, (Kan.); Laufer v. Gridgport T. Co., 2 Am. Neg. R., 310, (Conn.); Harrison v. Sutter St. Ry Co., 2 Am. Neg. R., 403, (Col.); Graney Et. Ux. v. St. L. I. M. & S. R. Co., 1 Am. Neg. R., 290, (Mo.); Gathard v. Ala. G. S. R. R. Co., 11 Am. Neg. Cas., 33, (Ala.); Jackson v. Grand Ave. Ry. Co., 4 Am. Neg. Cas., 727, (Mo.)

3. On instructions. (Chesapeake & Ohio R. R. Co. v. Keelin's Ad'mr, 22 Ky. L. Rep., 1942; Floyd v. Paducah Ry. & Light Co., 73 S. W., 1122; Central Pass. Ry Co. v. Chatterson, 14 Ky. Law Rep., 663; South C. & C. St. Co. v. McHue, 25 Ky. Law Rep., 1112; Flynn v. Louisville Ry. Co. 23 Ky. Law Rep., 57; Louisville Ry. Co. v. French & Co., 71 S. W., 486.

WHEELER, HUGHES & BERRY for Appellee.

POINTS AND AUTHORITIES CITED.

1. "It requires no expert to know when a car is moving at a dangerous rate of speed; to move it at any rate of speed is dangerous." (L. & N. R. R. Co. v. McCombs, 21 Ky Law Rep., 1232.)

2. "When a city adopts an ordinance regulating the speed of cars passing over its streets, one injured in collision with such cars cannot prove by such ordinance that the car was moving at a

Digitized by Google

greater rate of speed than allowed." (R. R. Co. v. Woods, 21 Ky. Law Rep., 575; L. & N. R. R. Co. v. Dalton, 19 Ky. Law Rep., 1318; Dolfinger v. Fishback, 12 Bush, 474; Ward's Ad'mr v. I. C. R. R. Co., 22 Ky. Law Rep., 191.)

3. "A street car has the right of way over streets traversed by it and it is the duty of travellers to give unobstructed passage to it." (Central Passenger Ry. v. Chatterson, 14 Ky. Law Rep., 663.)

4. "A motorman on a street car, seeing a person on the track, has a right to assume such person will leave it in time to avoid injury, and he need take no step until he, in the exercise of ordinary care, discovers that such person is not going to leave the track or is unaware of his danger." (Ward's Adm'r v. I. C. RR. Co., 22 Ky. Law Rep., 191; Gorman's Adm'r v. Louisville Ry., 24 Ky. Law Rep., 1938.)

5. "It is highly culpable for one totally deaf to walk on a car track over which he knows cars are constantly passing without keeping a look out for them."

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

This suit was instituted in the McCracken circuit court by the administrator of N. M. Ford against the Paducah City Railway, seeking to recover damages for the killing of N. M. Ford. The petition alleges that the defendant company, in operating one of its cars, carelessly, negligently, and recklessly ran upon and against deceased, knocked him down, and so injured him that he immediately thereafter died. The company's answer was a traverse, and also a plea of contributory negligence. A reply made up the issue. After the issue had been made, the plaintiff offered to file an amended petition, for the purpose of filing the franchise which the defendant company had from the city of Paducah. The defendant objected to the filing of this amendment, and the court sustained the objection, and refused to permit it to be filed. The trial resulted in a verdict for the defendant company, and the plaintiff appeals.

The proof shows that the deceased, an aged man,

Digitized by Google

was walking north, near one of appellee's car tracks on Sixth street in the city of Paducah, between Jackson and Tennessee streets, and that, while so walking, he was struck by a southbound car on said track; that is, a car running in the opposite direction. Sixth street, where the accident occurred, had no improved sidewalks; the sidewalks were laid out, but had not been paved. It was the custom of pedestrians to walk in the streets. The street at this point where the accident occurred had been recently graveled or macadamized, and was rough; the smoothest part was near the tracks, or between the rails of the track, of the defendant company. The deceased was very deaf. The accident was seen by but one eyewitness, a man named Dickey, who was sitting on his porch nearly opposite the place where the accident occurred. He states that when he first observed the deceased he was walking slowly along the street near the outer edge of—perhaps five feet from—the rail of the track; that he was gradually approaching the track. He was so situated on his porch that he could not see the car at the time. His attention was next directed by the ringing of the bell and the holloing of the motorman, and he looked up and saw the deceased almost opposite him, and too near the car track to permit the car to pass without striking him, the car at the time being some 60 or 80 feet from the deceased. The car did not run over deceased, but struck and knocked him down, and he died in about 15 minutes thereafter. The car came to a standstill before it had entirely passed deceased. The witness Sencer testifies that deceased was lying with his feet near the hind trucks of the car. The motorman in charge of the car did not testify, the proof showing that he was not, at the date of the trial, in the employ of the company, and had not been for a

Digitized by Google

month or more, and his whereabouts were unknown. A witness (Rice), flagman for the Nashville, Chattanooga & St. Louis Railway Company, testifies that he heard the car strike deceased when he was a square and a half away; that he heard the lick above the sounding of the bell and the holloing of the motorman; in fact, he says he is not positive he heard either the ringing of the bell or the holloing of the motorman, but it was the lick that attracted his attention. Appellant offered to prove by several witnesses who had had experience in the operation of street cars what would be a safe and reasonable speed in running cars, but the court refused to permit this testimony to go to the jury. These facts are taken from the statement thereof in appellant's brief.

Appellant claims that the trial court erred to his prejudice in several particulars, but principally in refusing to permit him to show by expert street car operators what would be a safe and reasonable rate of speed for a car while being operated over a street such as the one that this car was being operated on at the point where the injury occurred; second, that the court erred in instructing the jury; and, third, that the court erred in refusing to permit the amendment offering to file the franchise of the defendant company to be filed. We do not think that the court erred in refusing to permit the witness to testify as to what would be a reasonable rate of speed, for the reason that what might be negligence in the speed of a car in one portion of a city might not be negligence in another portion thereof; in fact, what would be negligence in the speed of a car in one square of a street, might not be negligence in the next square. So it is impossible to fix an arbitrary rate of speed at which it would be safe to operate a car within the city limits. Appellant was permitted to prove,

Digitized by Google

as best he could, the speed at which the car which ran against deceased was moving; he was permitted to show the condition of the street, the extent to which it was used by the public, and the purposes for which it was used in general by the public, and we are of the opinion that, with these facts before them, it was for the jury to say whether the car in question was traveling at a dangerous rate of speed. It has been held that to move a car at all is per se dangerous. L. & N. R. R. Co. v. McCombs, 54 S. W., 179, 21 Ky. Law Rep., 1232. The danger is not confined alone to the speed with which the car is moved, but to the manner in which it is operated as well, and, when the jury is told how fast the particular car in question was moving, the condition of the track over which it was moving, and the use to which the street was put over which it was moving, they must judge for themselves as to whether or not the rate of speed, under the circumstances and conditions shown to exist, was excessive.

Counsel for appellant contends with much earnestness that the court erred to his prejudice in refusing to allow proof that the ordinance of the city of Paducah requires street cars to move in the business sections of the city at a rate of speed not exceeding 8 miles an hour, and elsewhere at a rate not exceeding 10 miles per hour, and he cites authorities from several other states tending to support his contention. He does not cite any Kentucky authorities, however, and we have been unable to find any that tend to support his contention. On the contrary, it has been repeatedly held that the violation of a city ordinance in this respect is, of itself, no evidence of negligence. L. & N. R. R. Co. v. Redmon's Adm'x, 122 Ky., 385, 91 S. W., 722, 28 Ky. Law Rep., 1293; L. & N. R. R. Co. v. Dalton, 43 S.

Digitized by Google

W., 431, 19 Ky. Law Rep., 1318; Dolfinger v. Fishback, 12 Bush, 474. The violation of a city ordinance is no more evidence of negligence than obedience to its provisions would be evidence of due care. We do not think the trial court erred in refusing to permit the ordinance to be introduced.

Appellant complains of the instructions as given by the court, but a careful analysis of his objections thereto shows that his real objection is because the court said to the jury in instruction No. 1 that appellee had a right to use its track, and he argues from this fact that the jury were doubtless led to believe that appellee had the exclusive right to the use of its tracks. We do not think, however, that the jury was misled by this instruction. The Supreme Court of Pennsylvania, in the case of Ehrisman v. East Harrisburg City Railway, 24 Atl., 596, 17 L. R. A., 448, said: "There is this distinction to be observed between steam railroads and street railways. In the case of the former they have the exclusive right to the use of their tracks at all times and for all purposes. except at road-crossings. Street railways have not this exclusive right. Their tracks are used in common by their cars and the traveling public. While this common use is conceded and is unavoidable in towns and cities, the railway companies and the public have no equal rights. Those of the railway companies are superior. Their cars have the right of way, and it is the duty of the citizen, whether on foot or in vehicles, to give unobstructed passage to the cars. This results from two reasons: First, from the fact that the car cannot turn out or leave its track; and, secondly, for the convenience and accommodation of the public. These companies have been chartered for the reason, in part at least, that they are a public accommodation. The convenience of an

Digitized by Google

individual who seeks to cross one of the tracks must give way to the convenience of the public. It would be unreasonable that a carload of passengers should be delayed by the unnecessary obstruction of the track by a passing vehicle." And this court in the case of Central Passenger Railway Co. v. Chatterson, 14 Ky. Law Rep., 663, adopted the rule laid down in the Pennsylvania case, without qualification, as the law defining the relative rights of the street car companies and citizens in the use of the public streets. Under this rule, the street car had the right of way, and the appellant was not prejudiced because of the fact that the court, in its instruction so told the jury, and when the instruction complained of is read in conjunction with the other instructions given, we are of opinion that appellant was not prejudiced thereby.

Appellant also complains of instruction No. 3, because in that instruction the court told the jury that appellee had the right to assume that deceased would leave its track in time to avoid injury, etc. This objection is not well taken, for this court has repeatedly held to the contrary, and in the case of Ward's Adm'r v. I. C. R. R. Co., 56 S. W., 807, 22 Ky. Law Rep., 191, the rule is thus stated: "The rule is well settled in this State that those in charge of a railroad train on seeing a trespasser on the track have a right to assume that he will get out of the way, and need take no steps to stop the train to avoid injury to him, unless they have reason to believe that he is not aware of the danger, or unable to protect himself." In the case at bar, the proof shows that the deceased was walking north, along the edge of the car track, while the street car was approaching him, going south. There is no evidence that the motorman in charge of the car knew that the deceased

Digitized by Google

was deaf. In the absence of such knowledge he had a right to believe that the deceased would leave the track in time to avoid being struck by the car, upon hearing the ringing of the bell, and the motorman was not required to stop the car or to take steps to avoid injuring deceased until he discovered, or it became reasonably apparent to him, that deceased was not going to get out of the way. After having made this discovery, it was his duty to use all means in his power to avoid injuring him. The witness, Dickey testifies that the motorman not only sounded the bell, but that he holloed a warning to the deceased, and evidently made every effort that he could to avoid injuring him. The speed of the car at the time it struck deceased can best be determined from the fact that the car did not pass beyond deceased's body on the ground before it came to a complete stop. The proof is not at all satisfactory as to the rate of speed at which it was traveling, but it was certainly not traveling at a high rate of speed, or else it could not have been stopped within the short space within which it was stopped.

We are of opinion that the court gave to the jury the law of the case as warranted by the facts proven, and the judgment is affirmed.

Digitized by Google

CASE 64.—ACTION BY THE COMMONWEALTH FOR THE USE OF THE LOUISVILLE SCHOOL BOARD, AGAINST THE CHICAGO, ST. LOUIS & NEW ORLEANS R. R. CO., TO RECOVER CERTAIN REAL ESTATE AS ESCHEATED PROPERTY.—January 30.

Commonwealth, for Use of Louisville School Board, v. Chicago, St. L. & N. O. R. R. Co.

Appeal from Jefferson Circuit Court; Chancery Branch (Second Division).

SAMUEL B. KIRBY, Judge.

From a judgment dismissing its petition plaintiff appeals. Reversed.

1. Escheat—Land Held by Corporations.—Ky. Const. sec. 192, provides that a corporation shall not hold any real estate except such as may be necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat. Ky. Stats., 1903, section 567, contains the same provisions. Ky. Stats., 1903, section 2971, being a part of the laws relating to the government of cities of the first-class, provides that so much real personal, or mixed property in the city which, from alienage, defect of heirs, failure of kindred, or other causes, shall escheat to the commonwealth shall vest in the board for the benefit of the schools, and that the board may, in the name of the commonwealth, sue for and recover the same. Held, that the Legislature intended by the use of the words "other causes" in section 2971 to provide for the recovery of escheats by school boards happening upon events of a different class than those specially mentioned in the section, hence the board might sue to recover land escheated by a corporation under Const. Ky., section 192, and Ky. Stat. 1903, section 567.
2. Same—Grounds.—The state, in a just and proper exercise of its police power, may declare new causes of escheat of lands within its territory.

Digitized by Google

3. Statutes—Constitutional Law—Special Legislation.—Ky. Stats., 1903, sec. 2971, providing that the use of escheats in cities of the first class shall be for the public schools in such cities, and authorizing the school board to sue for the same, is not special legislation within the meaning of the constitutional inhibition, notwithstanding the state does not allow the same privilege to the school boards of other cities.

THOMAS H. PAYNTER, RANDOLPH H. BLAIN, D. W. SANDERS, W. RUMSEY KINNEY, PAUL F. SEMONIN, HARDIN H. HERR, attorneys for appellants.

POINTS AND AUTHORITIES.

(a) Under section 2971, Kentucky Statutes, the school board of cities of the first class can institute an action for the escheat of property for the cause mentioned in section 192 of the Constitution and section 567 of Kentucky Statutes. (Commonwealth v. Wis. Chair Co., 24 Ky. Law Rep., 170, S. C., 84, S. W., 535, distinguished; Commonwealth v. Farmer's Bank of Ky., 27 Ky. Law Rep., 153, S. C.; 84 S. W., 732, distinguished.)

(b) Under section 2971 of Kentucky Statutes, the school board can institute an action for the escheat of property for causes other than those mentioned in chap. 26 of the General Statutes and in Burnett's Code, page 674, section 45. The last named act is construed in Bank of Louisville v. Trustee, 83 Ky., 219.

(c) Section 192 of the Constitution and Sections 2567 and 2971 Kentucky Statutes, must be construed pari materia. (Am. & Eng. Encyc. of Law, vol. 26, page 620.)

(d) Every word of a statute must be given effect. (Broom's Legal Maxims (8th Amer. Edition), page 589; Lewis Sutherland Statutory Construction, sections 491 and 516, pages 919 and 954.)

(e) Where a statute shows that a right may be enforced by filing a petition, the parties seeking to enforce the right are not left without a remedy, because the statute prescribes no mode of special procedure. Either the court can direct the manner and procedure of the action, or resort can be had to the common law. (Board of Park Commissioners v. DuPont, 110 Ky., 743; 16 Cyc., 533; Crawford v. Comm., 1 Watts, (Pa.) 480.)

(f) The words "other causes" in section 2971 of Kentucky Statutes are not governed by ejusdem generis. (Chap. 44, Ky. Statutes; Lewis Sutherland Statutory Construction, sections 436 and 437; Nat. Bank of Commerce, 161 Mo., 126, S. C., 61 S. W., 587; Rex v. Shrewsberry, 3 B. & A., 216; Willis v. Mahon, 140 S. C., 31 Am. St. Reports, 626; Matthews v. Kimball, 70 Ark., 451.)

Digitized by Google

(g- The word heir can be used synonymously with devisee. (Hascall v. Cox, 29 Mich., 435, S. C., 13 N. W., 807; 21 Cyc., 416 and 420.)

(h) Sections 1606 and 1609 Kentucky Statutes, do not set forth any additional cause of escheat than those found in section 2971, but section 2971 sets forth additional causes not found in sections 1606 and 1609.

(i) The law of escheats considered. (Hamilton v. Brown, 161 U. S., 263; Wiederanders v. State, 64 Texas, 133.)

TRABUE, DOOLAN & COX, attorneys for appellee.

J. M. DICKINSON of counsel.

POINTS AND AUTHORITIES.

1. Ky. Stats., sec. 2971, must be construed in pari materia with secs. 1606, 1609, 1610, etc., and held to cover the same cases; sec. 2971 cannot give the Louisville School Board rights enjoyed by no one else.

2. Sec. 1606—and presumptively sec. 2971 are inapplicable to forfeitures claimed under sec. 567. (Commonwealth v. Wisconsin Chair Co., 84 S. W., 535, 27 Ky. Law Rep., 170; Same v. Farmers' Bank of Ky., 84 S. W., 732, 27 Ky. Law Rep., 153.)

3. Ky. Stats., sec. 2971, provides for escheats, including defect of heirs, and cases ejusdem generis, and not for forfeitures. (Cullen v. Butler, 5 M. & S., 461; Vaughn v. Porter, 16 Vt., 266; Park Comm'rs v. DuPont, 110 Ky., distinguished.)

4. Further distinction opinion in this case being delivered by same judge as in Com. v. Wisconsin Chair Co., and Same v. Farmers' Bank of Kentucky.

OPINION OF THE COURT BY CHIEF JUSTICE O'REAR—Reversing.

More than five years before the institution of this suit the Chicago, St. Louis & New Orleans Railroad Company (the lessor by a perpetual lease to appellee Illinois Central Railroad Company) became the owner in fee of certain lots of real estate in the City of Louisville, this State. It is charged in the petition in this case that the said real estate was not necessary

Digitized by Google

or proper, and was not being used, for carrying on the legitimate buiness as a railroad corporation by the railroad companies named and sued, and had not been so needed or used for more than five years before the beginning of the suit. The action was instituted by the Louisville School Board, suing in the name of the commonwealth for its behalf, to recover the property described, as escheated property. Section 192 of the constitution of Kentucky provides: "No corporation shall engage in business other than that expressly authorized by its charter, or the law under which it may have been or hereafter may be organized, nor shall it hold any real estate, except such as may be proper and necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat." Section 567, Ky. Stats., 1903, likewise provides: "No corporation shall engage in business other than that expressly authorized by its articles of incorporation or amendments thereto; nor shall any corporation, directly or indirectly, engage in or carry on in any way the business of banking, or insurance of any kind, unless it has become organized under the laws relating to banking and insurance; nor shall any corporation hold or own any real estate, except such as may be necessary and proper for carrying on its legitimate business, for a longer period than five years, under penalty of escheat." Section 2971, Ky. Stats., 1903, a part of the laws regulating the government of cities of the first class, reads: "So much real, personal or mixed property in the city, which, from alienage, defect of heirs, failure of kindred, or other causes, shall escheat to the commonwealth of Kentucky, shall vest in the board for the use and benefit of the schools. Said board may, in the name of the commonwealth, for the use and benefit of the public schools of the city,

Digitized by Google

by its president or other officer to be designated by it, enter upon and take posession of said property. or sue for and recover the same by an action at law or in equity, and without office found. The board may sell and convey any of such property by a warranty deed or otherwise."

The circuit court sustained a special demurrer to the petition, interposed by defendants, appellees, as suggesting the plaintiffs' incapacity to maintain the action. The petition was dismissed by the circuit court, which rested its decision largely upon the opinions of this court in Commonwealth v. Wisconsin Chair Co., 27 Ky. Law Rep., 170, 84 S. W., 535, and Commonwealth v. Farmers' Bank of Kentucky, 27 Ky. Law Rep., 153, 84 S. W., 732. Each of these cases was brought by the escheator of Ballard county to recover as escheated estate certain lands held by the corporations sued, and which it was alleged were not needed or proper for their legitimate business, and had not been needed nor used in their legitimate business for more than five years. Demurrers were sustained to each petition, on the ground that the escheator had not the right to maintain the actions. Chapter 44, Ky. Stats., 1903, relating to escheats. deals alone with escheats which are worked as the failure of heirs, or devisees, or the failure of the owner to take possession of the land for a certain number of years. That chapter provides for the appointment of an escheator, and defines his duties. It reads: "The escheator shall institute proceedings in the name of the commonwealth in the circuit court of the county in which the land lies that has vested in the commonwealth under the provisions of this chapter for the recovery of same." Section 1611, Ky. Stats., 1903. That chapter does not provide

Digitized by Google

for the escheat of lands owned by a corporation for whatever cause.

In the opinions of the two cases above cited, the court was careful to restrict its decision to the single proposition that the escheator's power was limited by the statute to the recovery of lands escheated by the provisions of chapter 44, and not having authority to sue for lands escheated from any other cause, he could not maintain the actions. Those opinions may be laid out of our consideration of this case, at least until it is determined whether the Legislature has conferred the power upon the school board to maintain action to recover lands escheated to the Commonwealth under the provisions of section 192 of the Constitution. The construction of section 2971, Ky. Stats., 1903, supra, becomes necessary to a decision of the case. The contention of appellee is, and such seems to have been the view of the circuit court, that the section deals alone with escheats as anciently applied. This view results from a construction of the language used, namely, "from alienage, defect of heirs, failure of kindred, or other causes," it being asserted that the general term "or other causes" is to be construed as limited by the preceding specific terms. It is claimed in this connection that the words escheat as used in the section helps out that view of the subject because as it was employed anciently only with respect to cases where there was no known heir to take the title to lands, and inasmuch as the section deals specifically with that class of event, the general clause is reasonably aud most naturally referable to other instances not enumerated of the genera specifically named.

Before examining further the rule of construction invoked by appellee, we deem it important to examine the premises upon which it is called into action.

Digitized by Google

The word "escheat" is an old one, and common in the law. It seems to have been derived from a French word, "echeoir," meaning to happen. It is also defined in its etymology to mean "to fall to; to fall to the lot of; to fall back." In feudal tenure the fief held the land of some superior on condition of rendering him services. Anciently the fee was limited to the use of the land by the vassal (Spelman, Feuds, c. 1), but this view was soon abandoned in favor of the one which now prevails; that is, that it is an estate of inheritance (2 Bl. Com., 106). But as the vassal and his heirs were not deemed to hold it upon the same condition, to-wit, that of rendering service to the lord of the manor, when the tenant died, and there were no heirs to whom the lord could look for service, the title demised to the original tenant reverted to the lord. It fell back. Hence it was described as escheat. Or, if the tenant, by reason of attainder of blood, was rendered incapable alike of holding or transmitting the title, the feud fell back into the lord's hands by a termination of the tenure, I Washb. Real Prop., 2. By a logical extension of the doctrine, when the line of inheritance failed, and the tenure was determined by any unforeseen event, the land resulted back, by a kind of reversion, to the grantor, or lord of the fee. 2 Shars. Bl. Com., 244. As in the United States there are no feudal tenures, escheats are invariably held to go to the state as the sovereign within whose jurisdiction the property may be situated, by way of reversion of the title to its source. Personal property never escheated in the original and technical sense of the term. Commonwealth v. Blanton's Ex'rs, 2 B. Mon., 393. January, 1840, the Legislature provided: "Estates within this commonwealth as to which the owner had previously died or might subsequently die intestate, without

Digitized by Google

legal heirs or distributees, should be vested in said Commonwealth without office found"—and it was held in Commonwealth v. Blanton, supra, and in White v. White, 2 Metc., 185, that personal, as well as real, estate was included. The same term and the same idea are carried forward into the existing statutes in this State. Although title to land in this State is allodial, as it is throughout the states of the Union, it seems to be the universal rule, in consonance with that of all civilized society, that, when the title lapses by reason of failure of heirs, and possibly for other reasons, it vests in the public, and is at the disposal of the government. Shars. Bl. Com., 244, 245. The reason is now probably that as no one of the public could rightfully claim it or enter upon it to the exclusion of others, and as it ought not to be suffered to lie barren, the government in behalf of all, has a better right to it than any one, although the right is also likened to and is by many supposed to rest upon the doctrines of the feud as they existed at the common law. The title to all lands within the State was formerly in the State, which had the right to declare upon what conditions it might be held, or transmitted. This is peculiarly so as to corporations holding land within the State.

In this view, we come to consider the causes upon which escheats take effect in this commonwealth. An alien may not inherit the title to lands in this State. except (1) if, not being an enemy, he has declared his intention to become a citizen of the United States according to the forms required by law; or (2) is the subject of a friendly state, and resides in this State, he may hold lands for residence or business for not exceeding 21 years; or (3) he may inherit, but may not hold the title longer than eight years. Article 3, c. 19, Ky. Stats., 1903. The section directly under

Digitized by Google

consideration therefore provides for an escheat by alienage. Estates in this commonwealth not disposed of by will of persons who have died without heirs or distributees entitled to same are the subject of escheat. Section 1606, Ky. Stats., 1903. Or if any heir or devisee fail for eight years to claim his distributive share of an estate, it shall escheat. Section 1608, Ky. Stats., 1903. The provisions of section 1609 relate more to the evidences of death and failure of heirs than to creating a distinct cause of escheat, providing that where the owner has not been heard from for seven years, and no acocunt can be had of him, or of his heirs, devisees, or distributees, he shall be presumed to have died without heirs. It seems to us that the terms "alienage," "defect of heirs," and "failure of kindred," are all comprehensive, and embrace every case of escheat allowed by the statute and enumerated above. There is no other cause of escheat called to mind, or pointed out to us, which may be likened, but not actually embraced in, the specific classes in section 2971, supra.

Are there any other causes of escheat in this State? We see that, by the organic law and by statute, it is declared that real estate owned by corporations under certain conditions shall escheat—shall fall back—to the sovereign, by whom the title was originally granted. Other causes might be provided by legislation. The provisions of section 192 of the Constitution are important, as will readily be seen upon a study of the subject, and the evil intended to be avoided, grave and clearly discernible, aside from the sufficient fact that the provision is in the Constitution, and for that reason alone never could be deemed of slight importance. In the exercise of the police power of the State, it is declared by the section to be inimical to the public

Digitized by Google

good that corporations, which may live always, and may grow ever so powerful, should be at liberty to hold any quantity of land, or engage promiscuously in business in this State; it was deemed safe and wise that they should be restricted in the first place to that business for which they were created, and in the next place that they should not be allowed to hold more land than was proper and needful in their legitimate business. Perpetual estates in land are deemed in this State to be impolitic, and are strictly prohibited. If, however, corporations might hold any quantity of land for any length of time, this important principle which regulates the holding of title to real estate in this State would be set at naught. Inattention to this restriction as to corporations would open up the widest door to a danger which has already begun to create real apprehension in some minds, and which is undoubtedly an actual danger.

It is complained that the provision of the Constitution is a forfeiture, and not an escheat; that an escheat is the taking charge by the government of property which belongs to no one, and brings it back to a state of usefulness, while the provision being considered takes property from the owner against his will, without compensation, without regard to its value, and gives it to another and different use and public service; that the taking is a penalty for the misuse of property by the owner, in no sense an escheat. We have seen that in this country the escheating of property to the government proceeds not only upon different grounds, in some instances, but upon a somewhat different principle from the feudal escheats, and includes, in fact, additional estates to those anciently affected by the practice. If the power be conceded, as it must be in the nature of the thing, we apprehend that it is competent for

Digitized by Google

the State to make new causes of escheat, as well as to apply it to new and different character of estates, and conditions. The Legislature may enlarge the legal meaning of a word of former limited meaning. The term "escheat" may, therefore, be properly applied to any state of case which the Constitution or legislation of the State may declare, in a just and proper exercise of the State's police power. The question is one more of policy than of power. This construction pursues the logic of escheating land to the lord anciently. Given, that all title emanates from the State, that an inhibition attaches against its being held longer than five years by a corporation when not needed or employed in the business which the corporation is allowed to do, a disobedience of the law leaves the property without an owner entitled to hold it, as in that event the power to hold the title is lacking, the title falls in, as it were, as anciently it did when the tenant died without heirs, or was banished or attainted by crime. Finding the title so, instead of leaving it forever suspended, it is made to revert to the original grantor, the commonwealth.

We have distinguished precedent for these conclusions: The Church of Jesus Christ of Latter Day Saints, commonly known as the "Mormon Church," was an incorporated religious and charitable society, chartered by the laws of the territory of Utah, and the preceding so-called "State of Deseret." It was admittedly legally incorporated, with power to acquire and hold title to real estate. It acquired some $2,000,000 worth of land. It practiced and taught plural marriage as a religious rite and ceremony. In 1862 Congress, under its power to enact laws for the government of its territories, prohibited the practice of polygamy under severe penalties, and in 1867 repealed the charter of the Mormon Church,

Digitized by Google

because it persisted in such practice and teaching, and provided for the escheating of all its lands, above $50,000 worth (which remnant was to be used strictly for religious purposes), to the government of the United States for the benefit of the public schools of Utah. The act provided for an action to recover such lands to be instituted by the Attorney General of the United States in the Supreme Court of Utah. An action to escheat the lands and other estates of the church was begun in the Supreme Court of the territory, and resulted in favor of the United States. A writ of error was prosecuted to the Supreme Court of the United States, where the judgment of the Supreme Court of Utah was affirmed. In the course of the thoroughly considered opinion written by Mr. Justice Bradley for the court, it was said: "Looking at the case as the finding of facts presents it, we have before us—Congress had before it—a contumacious organization, wielding by its resources an immense power in the territory of Utah, and employing those sources and that power to constantly attempting to oppose, thwart, and subvert the legislation of Congress, and the will of the government of the United States. Under these circumstances we have no doubt of the power of Congress to do as it did. * * * It is obvious that any property of the corporation which may be adjudged to be forfeited and escheated will be subject to a more absolute control and disposition by the government than that which is not so forfeited. The nonforfeited property will be subject to such disposition only as will be required by the law of charitable uses, whilst the forfeited and escheated property, being subject to a more absolute control by the government, will admit of a greater latitude of discretion in regard to its disposition. As we have seen, however, Congress has signified its will

Digitized by Google

in this regard, having declared that the proceeds shall be applied to the use and benefit of the common schools of the territory." Mormon Church v. United States, 136 U. S., 1, 10 Sup. Ct., 792, 34 L. Ed., 481. The power of the sovereign to prohibit, even by forfeiture, the use of lands within its territory, which in the fair exercise of its police power is deemed to be baneful to the public good, does not seem to us to be open to dispute. Its power to dispose of property forfeited for that cause, which it denominates an escheat, is equally free from doubt. We thus see that the use of the term in our Constitution is not inapt, and that the act and cause are within the discretion of the State. So is the disposition of the property.

The question recurs: Did the Legislature intend by section 2971, Ky. Stats., 1903, supra, to provide for the recovery of escheats by the school boards for "other causes" than those specifically mentioned in the section? There is no perceivable reason why the Legislature should devote to public educational purposes the property escheated for the particular reasons stated in the statute, and exclude from the same use escheats from other causes. The first rule of construction is to look to the language of the act, and to give effect to every word of it if possible. Among the rules for the construction of statutes is to read general words, following specific terms, not according to their natural and usual sense, but to restrict them to persons and things of the same kind as those just enumerated. This rule is, like all rules of construction, to aid the judicial mind in arriving at what was probably in the legislative mind in using the language employed. The reason of the rule is that as it is clearly indicated that the legislator was thinking of a particular class of persons or objects, his words of more general description may not have

Digitized by Google

been intended to embrace any other than those within the class. Sutherland on Statutory Construction (section 437) lays it down that this "doctrine of ejusdem generis yields to the rule that an act should be so construed as to carry out the object sought to be accomplished by it, so far as that object can be collected from the language employed.* * * So the restriction of general words to things ejusdem generis must not be carried to such an excess as to deprive them of all meaning. The enumeration of particular things is sometimes so complete and exhaustive as to leave nothing which can be called ejusdem generis. If the particular words exhaust a whole genus, the general words must refer to some larger genus. * * * The general words are not to be rejected, and the maxim of 'ejusdem generis' must yield to the maxim that every part of a statute should be upheld and given its appropriate effect, if possible. To deny any word or phrase its known and natural meaning in any instance, the court ought to be quite sure that they are following the legislative intention." Woodworth v. State, 26 Ohio St., 196; Foster v. Blount, 18 Ala., 687.

We think the particular words used in section 2971, supra, did exhaust the genera specifically named, and, unless some other meaning be given the general words "or other causes," they would fail of any meaning. And as we have seen, the cause of escheat under investigation is another cause in addition to, and different from, those specifically named, it must be held to have been intended to be embraced by that term in the statute. The State has by this statute designated who should sue on its behalf to recover, and to what public purposes should be dedicated, escheats in cities of the first class. This obviates the trouble encountered in Commonwealth v. Wisconsin Chair

Digitized by Google

Company, supra, and Commonwealth v. Farmers' Bank of Kentucky, supra, unless the act violates that provision of the constitution which forbids special legislation. As the State might have recovered this property, upon the facts alleged and admitted by the demurrer, it was competent for the State to devote it to any public use within its discretion. The fact that the Legislature has allowed the use of escheats in cities of the first class to the public schools in such cities, and authorized the school board, a public governmental agency, to sue for and recover them is not special legislation, although the State does not allow the same privilege to the school boards of other cities. The State is not bound to govern all its cities alike, nor to give the public schools of each all the privileges it does to those of all others. In fact, it does not do so in many other particulars.

The question is not here as to the right of the State to escheat property held by a corporation, which it may have acquired by condemnation, so as to defeat the right of reversion of the former owner. It is assumed, upon the allegations of the petition, that this property is held in fee simple by appellees.

Wherefore the judgment is reversed, and cause remanded for proceedings not inconsistent herewith.

Digitized by Google

CASE 65.—ACTION BY ADDIE M. THROGMORTON AGAINST H. A. GRIGSBY'S ADM'R TO RECOVER ON A CHECK CLAIMED AS A GIFT FROM DECEDENT.—January 31.

124 512
f136 406

Throgmorton v. Grigsby's Adm'r.

Appeal from Trigg Circuit Court.

THOMAS P. COOK, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Affirmed.

Gifts—Inter Vivos—Delivery—Checks.—The issual and delivery of a check for the purpose of a gift is not a delivery of the money, so that, the check not having been paid or accepted by the drawee, the gift is not completed, and therefore, the drawer cannot be considered as holding the money as trustee for the payee.

LEE & HESTER, attorneys for appellant.

AUTHORITIES CITED.

1. Trust. (Williamson v. Yeager, &c., 13 Ky. Law Rep., 275; Roche v. George's Exr., 14 Ky. Law Rep., 584; Krankel's Extr. v. Krankel, 20 Ky. Law Rep., 902; Barton v. Barton, 80 Ky., 215.)
2. Bill of exchange. (Murry v. Clayborn, 2 Bibb., 300.)
3. Limitation. (Baurer v. Baurer, 17 Ky. Law Rep., 242; Caldwell's Adm'r v. Hampton, 21 Ky. Law Rep., 793.)

ROBERT CRENSHAW and JAS. B. GARNETT for appellee.

CITATIONS.

Parson's on Contracts, 1st vol., 236; Curry v. Powers, 26 Am. Reports, 577; Simmons v. Cin. Sav. Society, 27 Am. Reports, 521; Harris v. Clark, 51 Am. Dec., Williamson v. Yeager, 91 Ky.; Roche v. George, 93 Ky., 609.

Digitized by Google

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

H. A. Grigsby, a bachelor, about 60 years old, resided near appellant's father, T. M. Heath, for about five years; then made Mr. Heath's his home for a long time. He became very much attached to Mr. Heath's 12-year-old daughter, Addie (now appellant). He petted and called her his little girl. On January 29, 1895, while on the eve of making a trip to Trigg county to visit his relatives, he wrote out his last will, in which he provided, should he not return to Graves county, those winding up his estate should give his tobacco crop, horse, and buggy and what money he had in the Mayfield National Bank to Addie M. Heath, the appellant. He also drew a check on the First National Bank of Mayfield, Ky., in favor of Addie Heath for $1,000, and gave both, the will and the check to her, and told her that she had better let her mother take care of them, and said that, if he did not return, her mother could collect the check for her, but if he came back he would take care of it for her, and make it make more money. He went on his trip, and was gone some three or four months. On his return he asked Addie if she had got that money on the check. She informed him that she had not; then he said he would use it for her. He also said that, if she collected it, she would spend it and would get nothing but the principal out of it, and, if he kept it, he would make it make more money for her. He made two or three trips back to Graves county from Trigg after that, and on each trip he made Mr. Heath's his home; and on several occasions asked Addie about the papers (the will and the check), and told her to keep them; that they would be of benefit

Digitized by Google

to her some day. On the last trip he told her that he had made that money double itself. Thus matters stood until 1905, when H. A. Grigsby died in Trigg county. The appellant brought this action on the check for $1,000 and its interest. The appellee by his answer put in issue the gift. The proof was taken by depositions. The depositions of appellant's five or six witnesses proved her case as stated. The appellee proved by one witness that he went with Grigsby the last trip he made to Graves county, which was in the fall of 1902, and when at Heath's he heard Addie, appellant, say to Mr. Grigsby that she had married and wanted to know of him if he was going to live up to his promises, which were to give her a horse and buggy and some money, that she wanted to go to housekeeping, and that he answered that he had made that promise upon condition that she married to suit him, which she had not done, and he would not give her anything. This was contradicted by several witnesses. Appellee also took the deposition of the cashier of the First National Bank of Mayfield, who filed a statement showing the account of H. A. Grigsby with the bank. At the date of the check sued on Grigsby had on deposit at the bank only about $400. After that he made other deposits and drew drafts which were paid. The last draft drawn by Grigsby upon the bank was November 19, 1895, which covered all that was due to him from the bank. He never at any time made any other deposits. On the trial the lower court found against appellant, and she has appealed.

Appellant contends that under the facts as proven in this case Grigsby made a gift to her of the $1,000; and afterwards he took charge of the fund as her trustee and managed it for her and increased the amount to $2,000. If he had made the gift complete.

Digitized by Google

her contention would be right; but, admitting as true all she says about it, in our opinion the gift was not complete. There was no consideration passed from her for the amount named in the check. He was not related to her in any way, and all that induced him to write the check was his regard for and attachment to her. In Parson on Contracts, volume 1, section 236, it is said: "From the established principles in regard to promises without consideration, and the necessity of delivery, and acceptance, it may be inferred that if the gift, inter vivos, be made by a note or promise, not under seal, it may be avoided by the donor, for it is not a present gift, but a promise without consideration. If it be by a check, or order or draft, then it can be revoked, and payment or acceptance stopped." In the case of Simmons v. Cincinnati Savings Society, 27 Am. Rep. 521, the court said: "The question as to what are the rights of a holder of a check for value, against the drawee or drawer, does not arise in this case. Many of the authorities cited by counsel for the plaintiff relate to this question and need not here be considered. The plaintiff claims as the payee of a check delivered to her by the drawer, who intended thereby to transfer to the plaintiff, by way of gift, the fund on which the check was drawn; and the question is whether before the payment or acceptance of the check by the drawee the gift was executed. It seems clear to us that until the check was either paid or accepted the gift was incomplete; and that, in the absence of such payment or acceptance, the death of the drawer operated as a revocation of the check. It is well settled that, in order to constitute a valid gift, there must be a complete delivery of the subject of the gift, either actual or constructive. The check in the present instance was a mere order or authority to the payee to draw

Digitized by Google

the money; and, being without consideration, it was subject to be countermanded or revoked while it remained unacted on in the hands of the payee." From these authorities it is clear that the issual and delivery of the check by Grigsby to appellant did not operate as a delivery of the money to her. She never had the possession of it either actually or constructively, and it required this to make the gift complete. Consequently she never had or owned the $1,000 and could not have turned it over to Grigsby as her trustee to manage for her.

From the facts as presented in this record it is evident that Grigsby had a great fondness for appellant and desired to give her a portion of his estate; but, unfortunately for her, he did not accomplish his purpose in a way so as to make it binding upon himself or his estate. The will referred to in the record is not copied, nor does it appear that it ever was probated; and we do not pass upon its validity, as it is not in issue in this case.

For these reasons, the judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 66.—ACTION BY ELIHU FORD AGAINST THE PROVIDENCE COAL COMPANY, TO RECOVER DAMAGES FOR PERSONAL INJURIES.—February 5.

124 517
f128 633
124 517
f134 10

Ford v. Providence Coal Co.

Appeal from Webster Circuit Court.

J. W. HENSON, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

1. Master and Servant—Action for Personal Injury—Filing Amended Pleadings—Discretion of Trial Court.—While the trial court has a large discretion in permitting amended pleadings to be filed, yet when during the progress of the trial it is developed by the evidence that an act of negligence not mentioned in the original pleading, caused or contributed to the injury complained of, the court should permit an amendment to be filed, on proper terms, especially when the amendment does not radically change the cause of action but merely adds an additional element to it.
2. Same.—The only limitation upon the filing of amendments, is that they must be in furtherance of justice, and do not substantially change the claim or defense.
3. Use of Defective Machinery—Expert Testimony—Competency.—In an action by a servant against the master for damages caused by the alleged negligence of the master in furnishing the servant with a defective machine used in mining coal, it was competent for the plaintiff to introduce expert evidence showing that a fender or cover should have been placed so as to guard an exposed cutting chain by which he was injured, so as to make the machine reasonably safe; and that ordinarily these machines were supplied with such fender, and that there were holes in the machine in question for the purpose of attaching the fender.
4. Safe Machinery—Duty of Master.—The rule in this State, and the one generally prevailing, is that while the master is not required to furnish the servant with absolutely safe or fault-

Digitized by Google

less machinery, or to provide the most modern appliances, he is required to furnish safe places and reasonably safe appliances for the use of the servant.

5. Exhibiting Injured Limb to Jury—Competency.—In the trial of personal injury cases it is competent for the plaintiff to exhibit the injured member to the jury, and this he may do upon the request of his counsel or of the adverse party, provided the exhibition does not violate any rule of propriety or decency.

JONSON & JENNINGS, attorneys for appellant.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Error in excluding testimony. (Elliott on Ev. secs. 672, 1030, 1031; Thompson on Neg. secs. 7747 and 7749; Hall v. Murdock, 114 Mich., 233; Fitts v. C. C. R. Co., 59 Wis., 323; Pullman Pal. Car Co. v. Harkins, 59 Fed. Rep., 932; Lou. Belt & Iron Co. v. Hart, 92 S. W., 951, 29 Ky. Law Rep., 310; McNamara v. Logan, 100 Ala., 187; Peterson v. Johnson, &c., Co., 70 Minn., 538; Cov. & C. Bridge Co. v. Goodnight, 60 S. W., 415, 22 Ky. Law Rep., 1242; Claxton's Adm'r v. Lex. & B. S. R. Co., 13 Bush, 641; L. & N. R. R. Co. v. Morton, 89 S. W., 243, 28 Ky. Law Rep., 355; Nadau v. White Riv. Lumber Co., 76 Wis., 120, 20 Am. St. Rep., 29; Berberich v. Lou. Bridge Co., 20 Ky. Law Rep., 467; Civil Code Ky., sec. 596; Champ v. Commonwealth, 2 Met., 17; Boner v. Commonwealth, 19 Ky. Law Rep., 409; Loving v. Commonwealth, 80 Ky., 507; Blackburn v. Commonwealth, 12 Bush, 181; Ashcraft v. Commonwealth, 24 Ky. Law Rep., 488; Nicholson v. Rust, 21 Ky. Law Rep., 645.)

Error in granting peremptory instruction. (Snydor, &c., v. Arnold, &c., 92 S. W., 289, 28 Ky. Law Rep., 1250; City of Madisonville v. Pemberton's adm'r, 75 S. W., 229, 25 Ky. Law Rep., 347; Standard Oil Co. v. Eller, 61 S. W., 8, 22 Ky. Law Rep., 1641; Thompson on Neg., sec. 425; Whites Personal Injuries in Mines, sec. 275; 2 Labatt Master & Servant, sec. 332a; Doyle v. Swift Iron Works, 5 Ky. Law Rep., 59; Merganthaler, &c., Basket Co. v. Taylor, 90 S. W., 968, 28 Ky. Law Rep., 923; Phister v. Peter, &c., 78 S. W., 458, 25 Ky. Law Rep., 1606; Ross-Paris Co. v. Brown, 90 S. W., 568, 28 Ky. Law Rep., 813; Stratton & Torstegge v. Mattingly, 89 S. W., 513, 28 Ky. Law Rep., 472; Ky. Freestone Co. v. McGee, 80 S. W., 113, 25 Ky. Law Rep., 2211; Merganthaler, &c, Basket Co. v. Lyon, 89 S. W., 522, 28 Ky. Law Rep., 471.)

3. The amended petition should have been filed. Kearney v. City of Covington, 1 Met., 339; I. C. R. R. Co. v. Jackson, 25 Ky. Law Rep., 2087.)

Digitized by Google

BAKER & BAKER and RUBY LAFFOON for appellee.

AUTHORITIES CITED.

1. The court did not err in refusing to allow appellant to file amended petition. (Humphrey v. Hughes, guardian, 79 Ky., 487; Brown v. Van Cleave, 86 Ky., 381; Section 134, Civil Code.)

2. The court did not err in giving a peremptory instruction upon the issues presented and facts proven or avowed. (Wilson, Adm'r v. Chess & Wymand Co., 25 Ky. Law Rep., 1655; Reiser v. Southern Planing Mill & L. Co., 24 Ky. Law Rep., 796; Mellott v. L. & N. R. R. Co., 19 Ky. Law Rep., 379; Reise v. Struck & Bro., 23 Ky. Law Rep., 1113; Caines' Adm'r v. O. V. Telephone Company, 20 Ky. Law Rep., 855.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

The appellant instituted this action to recover damages for injuries sustained while in the employ of appellee. His cause of action, as stated in the petition, was that in his capacity as hostler engaged in helping Fox, who was operating an electric machine in digging coal, and whilst exercising ordinary care for his own safety, and in a place where it was his duty to be in the performance of the labor required of him as hostler, the trousers of his right leg were caught in the chain or bits of the machine, and his leg mangled and broken to such an extent that it became necessary to have it amputated; that the machine provided by the defendant was unsafe, insufficiently equipped, and dangerous; and that its unsafe and dangerous condition was known to defendant, or could have been known to it, by the exercise of ordinary care, but was unknown to plaintiff. The answer was a traverse, and a plea of contributory neglect. At the conclusion of the evidence for the appellant the court sustained a motion for a peremptory instruction, and

Digitized by Google

in obedience to it the jury returned a verdict for appellee.

In view of the fact that there must be a retrial, we will not state or comment upon the evidence, except so far as may be necessary to present fairly the reasons why the court erred in taking the case from the jury. Appellant at the time of his injuries was about 24 years of age, and had been engaged in working about the mines for six months previous thereto, but his duties did not require him to work with the electric coal digger. Some six years prior to the injury he had worked with a similar machine as helper and operator for a few days, but had only been assisting as hostler with the machine that caused his injury one day before it occurred. The machine was in charge of an operator who was superior in authority to appellant. Appellant's duties in connection with the machine were to keep it clear of coal and slack, move it forward against the bed of coal as the machine cut into it, and adjust the jackscrews that held it in position. The machine was what is known as the 'Jeffrey Electrical Mining Machine," and in the language of a witness consisted substantially of a stationary frame and a cutting frame with superimposed electric motor, a gearing chain engaging in sprocket wheel carrying steel teeth or bits. The cutting frame carrying the chain and cutting bits travels to the coal as it is cut away. This cutting frame being three feet wide at the front end, and at each side of this cutter head is a sprocket wheel for carrying the chain with cutting bits. The cutting frame extends over the stationary frame five feet to the rear where the motor is rigidly fixed carrying another sprocket wheel, which imparts power to the cutting chain. The chain with its cutting bits goes under the stationary frame about 18 inches from the front jack-

Digitized by Google

screw, and from that point to the rear end of the stationary frame the chain and bits do not extend beyond the stationary frame so as to catch an object attaching to the stationary frame. The space from about 18 inches behind the front jackscrew to the end of the stationary frame and at the side of the cutting frame where the chain runs is exposed. In operating, the cutting frame is withdrawn into the stationary frame as far as possible; the machine is placed in position and secured by tightening the front jackscrew attached to it in the face of the coal to be cut, and the rear jackscrew into the coal in the rear of the frame behind the machine. When the current is turned on, the chain revolves, and the cutting frame by the action of the worm is carried forward until the bits revolving around the front end of the cutter head engage with the coal to be cut. The revolving of the chain with its cutting bits cuts the coal. When the coal has been cut to the depth of about five feet, the cutting frame is automatically reversed and withdraws into the stationary frame. The jackscrews are then released and the machine moved into position for another cut, and the operation repeated. The cutting bits are of steel, four inches long, one-half of an inch thick, being three-fourths of an inch wide, with the front end sharpened and bent slightly to the left, and are set alternately on each side of the chain with the set screws. The day before the injury, and when the machine was started, Garrett, a machinist, told Fox, in the presence of the appellant, that the machine was all right, and that he might get ready and go to work. Fox gave the appellant orders to unscrew the jackscrews, and get ready to move the machine forward before it stopped—the idea being to save as much time as possible. Appellant did not receive any explanation or instruction concerning the

Digitized by Google

operation of the machine, except the direction given to him by Fox relative to loosening the jackscrews. During the examination of appellant it was disclosed that, in obedience to the directions of Fox, he had loosened the jackscrews before the machine was stopped, and, when it did so, it caused the machine to slip to one side, bringing his leg in contact with the unprotected chain on the side on which he was standing, and it may fairly be said that the slipping of the machine, due to the fact that the screws were unloosened, caused the exposed chain and knives to come in contact with his leg. After the motion for a peremptory instruction had been made, and pending its disposition by the court, appellant offered to file an amended petition, stating, in substance, that while engaged in performing his duty, Fox, with gross negligence, ordered him to release the front jackscrew on the mining machine while the same was in motion; that to comply with this order was dangerous to plaintiff, as was well known to Fox, or could have been known to him by the exercise of ordinary care, but was unknown to plaintiff, and was not obvious or apparent, and could not have been discovered by him by the exercise of reasonable care; that, relying on the order of Fox, he released the jackscrew, when the mining machine slipped around, and the chain and bits thereof caught plaintiff's right leg, injuring it in the manner heretofore stated. The objection of appellee to the filing of this amended pleading was sustained and this assignment of error we will first dispose of.

The trial court has a large discretion in respect to permitting amended pleadings to be filed, and ordinarily this discretion will not be interfered with by this court. Greer v. City of Covington, 83 Ky. 410, 7 Ky. Law Rep. 419, 2 S. W. 323; L. & N. R. R. Co.

Digitized by Google

v. Pointer's Admr., 113 Ky. 952, 69 S. W. 1108, 24 Ky. Law Rep. 772. But when, as in this case, during the progress of the trial it is developed by the evidence that an act of negligence not mentioned in the original pleading caused or contributed to the injury complained of, the court should permit an amendment presenting it to be filed on proper terms. Especially should this rule prevail when the amendment does not radically change the cause of action, but merely adds an additional element to it. Under the averments of the original petition the plaintiff would be confined to the negligence specifically set out, which was that the machine was in a dangerous and unsafe condition, and would be denied the right to submit to the jury the question of negligence growing out of the slipping of the machine caused by the order given to him by his superior. The rule being that when the negligence is specified, the plaintiff will be confined to it. Thomas v. L. & N. R. R., 35 S. W. 910, 18 Ky. Law Rep. 164; Chun v. K. & I. Bridge Co., 64 S. W. 649, 23 Ky. Law Rep. 1092. The acts of negligence set out in the original and in the amended pleadings were not inconsistent, and might have been embraced in one pleading, as the pleader has the right to state as many acts of negligence growing out of the same transaction as the facts warrant, and if either of them is sustained by evidence, a recovery may be had. L. & N. R. R. Co. v. Shearer, 59 S. W. 330, 22 Ky. Law Rep. 929. The only limitation upon the filing of amendments is that they must be in furtherance of justice and do not change substantially the claim or defense. Civil Code of Practice, section 134; I. C. R. R. Co. v. Jackson, 117 Ky. 900; 79 S. W. 1187, 25 Ky. Law Rep. 2087; Kearney v. City of Covington, 1 Metc., 339. In this latter case, an amended pleading was permitted to be filed after

Digitized by Google

the court had instructed the jury, but before the verdict had been rendered. We are of the opinion that, as the amendment offered did not substantially change the cause of action, and was in furtherance of justice, the court should have permitted it to be filed.

During the progress of the trial appellant offered to show by witnesses who qualified themselves as being competent to testify as experts that a fender or cover should have been placed along the space about 18 inches where the cutting chain was exposed that came in contact with appellant's leg to make the machine reasonably safe, and that ordinarily when these machines were shipped from the factory they were equipped with this fender, and that there were holes in the machine in question for the purpose of attaching the fender. This evidence was competent, as the question to be considered was whether or not the machine was defective or reasonably safe. The machine under investigation was a complicated and comparatively new invention, used exclusively in mining coal, and it is fair to assume that the jurors trying the case were not familiar with the mechanism, or, from their knowledge, competent to form an opinion as to what appliances ought to be attached to it to make it reasonably safe for use. The rule in regard to the admission of expert testimony is very well stated in American & English Encyclopædia of Law, volume 12, p. 422, where it is said: "The general rule as to the admissibility of expert evidence is that persons having a technical or peculiar knowledge on certain subjects are allowed to give opinions when the question involved is such that the jurors are incompetent to draw their own conclusions from the evidence without the aid of such evidence." One of the cardinal rules governing the admission of expert evidence is that it must usually be of such a character

Digitized by Google

as not to fall within the range of common experience and observation, and therefore not to be intelligible to jurors without the aid of opinion. The test of admissibility of expert testimony is not whether the subject-matter is common or uncommon, nor whether the witness can claim superior judgment or powers of reasoning, or better comprehends or appreciates the matter at issue, but whether the question upon which the evidence is offered is one of science or skill. On page 424, an expert is defined as "one possessing, in regard to a particular subject or department of human activity, knowledge not acquired by ordinary persons," or, as defined by a scientific writer, "an expert is one who can see all sides of a subject. This knowledge may be derived from experience, or from study and direct mental application." Nor is it required that the expert testimony should be the most perfect obtainable, nor that the witness should at the time be actively engaged in the occupation concerning whose lore he has been called to testify, though long abandonment thereof may be sufficient ground for exclusion. And it is said on page 440 that "an expert machinist may testify that a certain machine has not been handled properly and skillfully, and may express opinions in regard to the comparative safety of operating a bolting cloth with and without a carriage attachment." Louisville Belting & Iron Co. v. Hart, 122 Ky. 731, 92 S. W. 951, 29 Ky. Law Rep. 310; Claxton's Admr. v. Lexington & Big Sandy R. R. Co., 13 Bush, 636.

It is also assigned as error that the trial judge refused to permit appellant to exhibit his injured leg to the jury. As the leg had been amputated, this ruling was not prejudicial, but, in the trial of personal injury cases, it is competent for the plaintiff to exhibit the injured member to the jury, and this he

Digitized by Google

may do upon the request of his counsel or of the adverse party—provided that the exhibition does not violate any rule of propriety or decency. Whether it does so or not is, of course, a question that must be left largely in the discretion of the trial judge. No objection of this kind could be urged in this case, as the exhibition of a man's leg that has been amputated could not be considered at all improper. Evidence of this character is really the best evidence obtainable of the extent and character of the injury that the person seeking damages has sustained, and the jury have the right to be aided in making up their verdict by a personal view of the injured member. Newport News & Miss. V. R. R. Co. v. Carroll, 31 S. W. 132, 17 Ky. Law Rep. 374; Williams v. Nally, 45 S. W. 874, 20 Ky. Law Rep. 244.

The rule in this State, and the one generally prevailing is that, while the master is not required to furnish the servant with absolutely safe or faultless machinery, or provide the latest and most modern appliances, he is required to furnish reasonably safe places and reasonably safe appliances for the use of the servant. Mergenthaler-Horton Basket Co. v. Taylor, 90 S. W. 968, 28 Ky. Law Rep. 923; Reiser v. Southern Plan. M. & L. Co., 114 Ky. 1, 69 S. W. 1085, 24 Ky Law Rep. 796; Pfisterer v. Peter & Co., 117 Ky. 501, 78 S. W. 450, 25 Ky. Law Rep. 1605; Shearman & Redfield on Negligence, section 194; Thompson on Negligence, section 3767. Under this rule, as applied to the facts of this case, the question as to whether or not the master had provided reasonably safe appliances for the servant to work with and as to whether or not the injury was caused, in whole or in part, by the machine slipping, due to the orders of Fox to loosen the jackscrews, should have been submitted to the jury under proper instructions.

Digitized by Google

Wherefore, the judgment is reversed with directions for a new trial in conformity with this opinion.

Petition for rehearing by appellee overruled.

CASE 67.—ACTION BY ELLA MAY CHAPMAN AGAINST THE NEW GALT HOUSE COMPANY FOR DAMAGES FOR PERSONAL INJURIES.—February 5.

New Galt House Co. v. Chapman

124 527
f137 359

Appeal from Jefferson Circuit Court (C. P. Branch, Third Division).

MATT O'DOHERTY, Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

Master and Servant—Injury to Servant—Negligence—Customary Equipment of Appliances.—A servant, injured by the starting of a dumb waiter while she was taking dishes from it, cannot recover of the master, on the ground that it was negligence not to have it equipped with a device preventing its being started while one was taking things from it, it never having been so equipped, and there being no evidence that they were usually or generally so equipped.

BARKER & WOODS for appellant.

POINTS AND AUTHORITIES.

1. Whatever injury appellee received, was the result of the risk assumed by her in the employment, and a peremptory instruction should have been given. (McCormick Har. Mach. Co. v. Liter, 23 Ky. Law Rep. 2154; Kelly v. Barber Asphalt Co., 93 Ky., 363; Wilson's Adm'r v. Chess & Waymond Co., 25 Ky. Law Rep., 1655; Williams v. Railroad, 111 Ky., 822; Mann v. Moore, 24 Ky. Law Rep., 253; Needham v. Railroad, 85 Ky., 423; King v.

Digitized by Google

Lumber Company, 93 Mich., 172, 53 N. W., 10; Wagner v. Chemical Company, 147 Pa., 475; 1 Labatt on Master and Servant, sections 259, 263, 264, 274, 274a.)

2. The instructions submitted by the court did not present to the jury the real issue tried in the evidence. The instructions offered by appellant should have been given. (Thomas v. Railroad, 79 Ky., 160; L. & N. R. R. Co. v. Morton, 28 Ky. Law Rep., 355, Georgia Railroad v. Cartledge, 42 S. E., 405; Mississippi Logging Co. v. Schneider, 20 C. C. A., 390; Delaware Iron Works v. Nuttal, 119 Pa., 149; Ross v. Pearson Cordage Co., 164 Mass., 257; Sweeney v. Berlin Envelope Co., 101 N. Y., 520; Kohn v. McNulta, 147 U. S., 238, 241.)

3. The injury of appellee was the result solely of the negligence of a fellow-servant, and the master is not liable. Dana v. Blackburn, 28 Ky. Law Rep., 695; Fort Hill Stone Co. v. Orm's Adm'r, 84 Ky., 182; Volz v. C. & O. Ry., 95 Ky., 188; L. & N. R. R. Co. v. Edmonds, 23 Ky. Law Rep., 1049.)

4. The defense of fellow-servant is available under a general denial, and need not be specially pleaded. The appellant was entitled to an instruction on that point. (2 Thompson on Trials, sec. 2310 et sec.; Sheehan v. Prosser, 55 Mo. App., 569; Kaminski v. Tudor Iron Works, 167 Mo., 462; Wilson v. Charleston, etc., R. R., 28 S. E., 91; Louisville Ry. Co. v. Meglemery, 25 Ky. Law Rep., 1587; Section 95, Kentucky Code of Practice; Thompson on Negligence, vol. 4, sec. 4877; Bliss on Code Pleading, 432.)

5. The damages are excessive.

KINNEY & FITZGERALD for appellee.

AUTHORITIES CITED.

Pfisterer v. J. H. Peter & Co., 78 So. West'n Rep., 452; Bates-Rogers Const. Co. v. Dunn, 93 So. West'n Rep., 1032; Ohio Val. Ry. Co. v. McKinley, 33 So. West'n Rep., 187; Shemwell v. Owensboro & N. R. Co., 78 So. West'n Rep., 448; Wilson v. Chess & Wymond Co., 78 So. West'n Rep., 454; L. & N. Co. v. Foley, 21 So. West'n Rep., 866, 94 Ky., 224; Bogenschutz v. Smith, 1 So. West'n Rep., 580; Western Union Tel. Co. v. Holtby, 93 So. West'n Rep., 653; Dow Wire Works Co. v. Morgan, 96 So. West'n Rep., 530; Ashland Coal Iron & R'way Co. v. Wallace's Adm'r, 42 So. West'n Rep., 746; Bowling Green Stone Co. v. Capshaw, 64 So. West'n Rep., 508; Cooper's Adm'r v. Oscar Daniels Co., et al., 96 So. West'n Rep., 1101; VanDyke v. Packett Co., 71 So. West'n Rep., 441; Newport News & M. V. R. Co. v. Camp., 25 So. West'n Rep., 268; Beach on Cont. Neg. sec. 360; Beach on Cont. Neg., 3rd Ed., sec. 348, page 501; A. & E. En. of Law, vol. 20, page 55;

Digitized by Google

Enc. of Pld. & Prac., vol. 13, page 913; Shearman & Redfield on Neg., vol. 1, sec. 188, page 292, and sec. 212; 4 Thompson on Neg., 2nd Ed., sec. 4654, page 680, and sec. 212; Williams v. The Railroad, 111 Ky., 282; K. & I. Bridge & R. R. Co. v. Snydor's Adm'r, 26 Ky. Law Rep., 955.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

To reverse a judgment rendered against it in behalf of appellee, this appeal is prosecuted.

The facts exhibited by the record may be thus stated: Appellee, at the time of the injury, was employed in the pantry of the Galt House. She was 31 years of age, and had previously worked in the kitchen. The kitchen is situated on the second floor, and the dining room and cafe on the first floor, adjacent to the pantry. The communication between the kitchen and pantry was by means of a dumb waiter moved by an electric motor. Through this the food was sent down from the kitchen, and the soiled dishes sent up from the pantry. On the kitchen floor a servant of appellant received the food, put it in the dumb waiter, and sent it down to the pantry, and likewise received the soiled dishes sent back, and delivered them to the kitchen. Appellee's duties were to take the dishes with food on them out of the dumb waiter when it came down to the pantry. The waiter was started either up or down by pulling a small cable rope, and it could be started from either the kitchen or pantry. The servant in either place, by pulling the rope, could send the waiter up or down at his pleasure. A speaking tube was supplied, by means of which the persons in the kitchen and pantry could communicate with each other; but they could also speak through the well of the dumb waiter. Appellee

Digitized by Google

worked in the pantry in connection with the waiter about two months. On the occasion of the accident, she was in the act of taking food out of the waiter, her arms being inserted into it for that purpose, when suddenly the waiter started upwards, catching and fastening appellee's arms between the shelf of the waiter and the shaft. The result was that appellee was lifted a short distance from the floor and remained suspended for a few minutes until the waiter was sent down, receiving serious injuries that may result in permanently destroying the use of one of her arms. Appellant asks a reversal of the case because the court erred in instructing the jury, and in failing to give a peremptory instruction asked for, and because the evidence is wholly insufficient to support the verdict.

The negligence complained of in the petition is thus stated: "She says that said injuries were caused by reason of the dangerous and defective condition of the said elevator, in that it was without suitable locks and brakes to render it impossible to be moved upwards while removing articles from the same; that said elevator was in said dangerous condition by and through the gross negligence and carelessness of the defendant, and that said defects were known to the defendant, or could, by the exercise of ordinary care, have been known to it, and was unknown to the plaintiff." It will be observed that the gist of the complaint is the failure to have the waiter equipped with suitable locks or brakes to prevent it from being moved upwards while articles were being taken from it. There is no complaint that the dumb waiter was defective in any other respect, so that the liability of appellant depends on the question whether or not it was its duty to have this waiter equipped with a device that would prevent it from being moved or started upwards without the consent and assistance

Digitized by Google

of the servant working in the pantry. There is no evidence whatever in the record that this dumb waiter previous to the injury had ever been equipped with any device of this character, or any lock or brakes. Nor is there any competent testimony that similar waiters were usually or generally equipped with an appliance of this sort. Upon this point, two witnesses testified for appellee. Toney Hubbuch said that this was the first dumb waiter he ever worked with. Asked if he had ever seen a dumb waiter like the one which was operated equipped with locks and brakes to keep them from going up, he answered: "No, sir, I never worked with a dumb waiter before. That was the first dumb elevator I ever worked with in my life. Q. Did you ever see a lock on a dumb waiter? A. No, sir, I have seen this one." Albert H. Hall was asked: "In your experience as you say since 1879, have you had much experience with these waiters? A. Yes, sir, but not with electricity; in dumb waiters, yes; lots of hotels I have worked in that had them. Q. I will ask you whether or not there is any provision in the way of safety appliances to lock them by brakes or clamps, so that when they are down they cannot be pulled up until they are released? A. Those appliances were made after the lady was hurt. Q. Are there such appliances on elevators? A. Yes, sir. Q. You say there are such appliances used on elevators? A. Yes, sir. Q. For what purpose? A. For safety, to keep from having somebody at the other end pull it up. Q. Was there such an appliance on this elevator at the time she was injured? A. No, sir. Q. Were those appliances in general use at the time this occurred? A. No, sir, they weren't put there until after the lady was hurt. Q. I don't mean on this particular elevator, but on elevators generally used? A. I haven't seen or worked with any other electric elevator. Q. I am

Digitized by Google

speaking of any dumb waiter? A. I suppose there was. Q. Do you know? A. I don't know. Q. I am not speaking about the power—never mind whether it was steam, electricity, or what, but are the locks and brakes you have spoken of generally used on other dumb waiters? A. As far as I know, yes, sir." Several witnesses testified—in fact, it is conceded—that the waiter could have been equipped with a safety lock or appliance that would prevent it from going up without the consent or assistance of the person in the pantry, and that, if it had been so equipped at the time, it could not have started when appellee was injured without her aid.

The law in relation to the duty of employers in respect to machinery like the elevator in question is very well settled in this State. In fact, this court has followed the rule generally approved, and thus stated by Shearman & Redfield in their work on Negligence, section 195: "The master is not bound to provide the very best materials, implements, or accommodations which can be procured, nor those which are absolutely the most convenient or most safe. His duty is sufficiently discharged by providing those which are reasonably safe and fit. Still less is he bound to furnish every new improvement or invention, but he may wait where the question of safety is involved until an alleged improvement has been tested and has come into somewhat general use. Only such appliances, safeguards and tests as are usual, can be required." And in Thompson on Negligence (section 3993), where the following rule is thus laid down: "The master is not under an obligation under all the circumstances to make use of the best and safest known appliances and instruments, nor is he responsible for failure to discard one which is not of the safest possible kind which can be secured, and to supply

Digitized by Google

anything in its place which may be safer, nor is he required to furnish under all circumstances, and without regard to their cost and his ability to pay for them, the newest and best kind of implements which may be in use in his line of business, nor is he required, as a matter of law, to provide machinery of any particular description; but he discharges his duty to his servant when he provides those which are in common and generally used in his business, which are considered safe by other employers generally, who are engaged in the same business, and which may be safely operated by the exercise of ordinary or reasonable care. He discharges his duty if the machine, tools, and appliances which he furnishes for the use of the servant are reasonably safe for the purpose intended." So, in McCormick Harvesting Machine Co. v. Liter, 66 S. W. 761, 23 Ky. Law Rep. 2154. this court said: "A master is not required to furnish machinery with the latest improvements. It is the duty of the master to provide reasonably safe machinery for the use of his employes, and to keep it in reasonably safe repair." To the same effect is Dow Wire Works Co. v. Morgan, 96 S. W. 530, 29 Ky. Law Rep. 854. Applying these principles of law to the facts as presented by this record, it is manifest that the motion for a peremptory instruction should have been sustained. The mere failure of appellant to provide the waiter with a lock or brake was not sufficient under the evidence to charge it with a breach of duty to appellee. The measure of its duty to her was fully discharged when it furnished a reasonably safe waiter for her use. If there was evidence tending to show that this waiter had ever been equipped with a device to prevent it from going up, or if it was shown that an appliance of this kind was in general use on waiters of this class, or if any other negligence was alleged

Digitized by Google

or proved, a different state of case would be presented. But, in the face of the uniform rule applicable to cases of this character, and so often approved by this court, one that is just to the master as well as to the servant, we do not feel at liberty to hold that, under the evidence, appellant, in failing to provide this waiter with a lock or brake, was guilty of negligence.

In all occupations where machinery is employed the servant must, in the very necessity of things, take and assume some risk. The master is not an insurer of the person of his employes against injury incurred in his service, nor is he required to warrant the safety or sufficiency of the machinery or premises. When the appliance or machine or premises furnished is reasonably safe, measured by the use to which it is put, his duty is fully performed. And, under the operation of this sound rule, it is said in Thompson on Negligence (section 3993) that: "It is not sufficient that there are later or safer appliances to be had, but that supplied must have some radical fault, or its use have become so generally obsolete or supplanted by others superior thereto that its adoption or retention will itself indicate negligence." There is evidence tending to show that the injuries appellee received resulted from the negligence of a fellow servant, but, in view of the conclusion we have reached, we do not deem it necessary to consider this question.

Wherefore, the judgment is reversed, with directions for a new trial.

Digitized by Google

CASE 68.—ACTION BY THE COMMONWEALTH OF KENTUCKY BY FRANK A. LUCAS AS REVENUE AGENT FOR THE STATE-AT-LARGE AGAINST THE CUMBERLAND TELEPHONE & TELEGRAPH COMPANY TO RECOVER A FRANCHISE TAX.—February 5.

124 535
135 320

Commonwealth By &c., v. Cumberland Telp. & Telg. Co.

Appeal from Christian Circuit Court.

THOMAS P. COOK, Circuit Judge.

From a judgment of the circuit court affirming an order of the county court sustaining a demurrer to the statement plaintiff appeals. Affirmed.

Taxation—Corporations and Corporate Property—Corporate Franchise.—Ky. Stats., 1903, sections 4077-4081, provide that certain corporations, including telephone companies, shall, in addition to other taxes, annually pay a tax on their franchises to the State and a local tax thereon to the county, incorporated city, town, and taxing district where the franchises may be exercised; and each corporation shall report the amount of tangible property in the State, and where situated and assessed, and the fair cash value thereof; and the board of valuation and assessment is to fix the value of the capital stock of each corporation, and from such amount deduct the assessed value of all tangible property assessed in the State—the remainder to be the value of its corporate franchise, subject to taxation in each county, incorporated city, town, or district through or into which the lines of the company pass. Section 4020 provides that all property of domestic corporations, including intangible property, considered in determining value of franchises, shall be subject to taxation, unless exempt by the Constitution, and shall be assessed at its fair cash value. Held, that the bonds, notes, accounts, cash, stock in other corporations, and other credits of a telephone corporation are intangible property, and not subject to assess-

Digitized by Google

ment by the local assessor, but are to be considered by the board of valuation in fixing the franchise tax.

TAYLOR & LUCAS and JOHN C. DUFFY for appellants.

HUNTER WOOD & SON and WM. L. GRANBERRY for appellee.

(No briefs—record misplaced.)

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Frank A. Lucas, as revenue agent for the State at large, filed a statement in the name of the commonwealth against the Cumberland Telephone & Telegraph Company in the Christian county court, in which he charged that for the years 1900, 1901, 1902, 1903 and 1904 the telephone company was the owner and in possession of bonds, notes, accounts, cash in hand and in bank, stock in other corporations, and other credits, of the value of $5,000,000, and that it had failed to list the same, or any part thereof, with the assessor or board of supervisors of Christian county. The county court sustained a demurrer to the statement, and dismissed the proceedings. An appeal was taken to the circuit court, which entered the same judgment, and the plaintiff has appealed to this court.

The question to be determined is whether the stocks, bonds, notes, accounts, money, and other credits, of the telephone company, which is a Kentucky corporation, are to be listed with the assessor in its home county, or are to be considered by the board of valuation and assessment in assessing the franchise of the company? It is not averred that this board has not assessed the property referred to; but it is insisted that this board has no authority to consider such mat-

Digitized by Google

ter, and that the proper place for the property to be assessed is with the county assessor at the residence of the corporation. The case simply involves a construction of the statute. Article 1 of the revenue act relates to general provisions; article 2. assessment of property; article 3, the assessment of certain corporations. Section 4077, Ky. Stat., 1903, which is the first section of article 3, provides that certain corporations. including telephone companies, shall each, "in addition to the other taxes imposed on it by law, annually pay a tax on its franchise to the State, and a local tax thereon to the county, incorporated city, town and taxing district, where its franchise may be exercised." The next section (4078) provides how the franchise tax is to be fixed, and requires certain reports from these corporations. One of the things required to be reported is "the amount and kind of tangible property in this State, and where situated, assessed, or liable to assessment, in this State, and the fair cash value thereof, estimated at the price it would bring at a fair voluntary sale." The next section (4079) requires the board to take into consideration all the facts before it, and fix the value of the capital stock of the corporation, and from the amount thus fixed, to "deduct the assessed value of all tangible property assessed in this State, or in the counties where situated. The remainder thus found shall be the value of its corporate franchise subject to taxation as aforesaid." Section 4081 further provides that the corporate franchise shall be liable to taxation in each county, incorporated city, town, or district through or into which the lines of the company pass, in the same proportion that the length of the line in such county, city, town, or district bears to the whole length of lines in the State.

When the entire capital stock of a corporation is

Digitized by Google

valued, this represents all of its property of every kind; for every part of the property the company goes to make up the value of its capital stock. The only deduction from this sum total, authorized to be made by the statute, is the assessed value of all the tangible property assessed in the State, or in the counties where situated, and, that the board may know what deduction to make, the corporation is required to report the amount and kind of tangible property it owns in the State, where situated, assessed, or liable to assessment. As the board of valuation is not authorized to deduct from its assessment anything but the tangible property assessed, or liable to assessment, in this State, it necessarily follows that all other property except this is included in its assessment. Section 4020 of the general provisions reads as follows: "All real and personal estate within this State, and all personal estate of persons residing in this State, and of all corporations organized under the laws of this State, whether the property be in or out of this State, including intangible property, which shall be considered and estimated in fixing the value of corporate franchises as hereinafter provided, shall be subject to taxation, unless the same be exempt from taxation by the Constitution, and shall be assessed at its fair cash value, estimated at the price it would bring at a fair voluntary sale." This provision also shows that the intangible property of the corporations subject to the franchise tax must be considered and estimated in fixing the value of corporate franchises as provided by subsequent sections. The property referred to in the statement is intangible property, and was not subject to assessment by the local assessor, but was to be considered by the board of valuation in fixing the franchise tax. The franchise tax under the statute is, as has been often held, simply

Digitized by Google

a tax upon the intangible property of the corporation. Henderson Bridge Company v. Commonwealth, 99 Ky. 641, 17 Ky. Law Rep. 389, 31 S. W. 486, 29 L. R. A. 73; Louisville Tobacco Warehouse Company v. Commonwealth, 106 Ky. 165, 49 S. W. 1069, 20 Ky. Law Rep. 1747, 57 L. R. A. 33; Marion National Bank v. Burton (Ky.), 90 S. W. 944, 28 Ky. Law Rep. 864, 121 Ky. 876.

Judgment affirmed.

CASE 69.—MOTION BY PEOPLES' BANK OF KENTUCKY'S ASSIGNEE AGAINST MATTIE C. BARBOUR, ETC., TO REVIVE A JUDGMENT AGAINST THEM IN THE CIRCUIT COURT.—February 6.

Peoples' Bank of Kentucky's Assignee v. Barbour, &c.

Appeal from Jefferson Circuit Court (Chancery Branch, First Division).

SHACKELFORD MILLER, Judge.

Motion overruled, and plaintiff appeals. Affirmed.

Judgment—Dormant Judgment—Revival—Death of Party—Statute of Limitations.—An execution issued on a judgment after one of the defendants in the judgment dies is void as to the one deceased, and cannot be enforced against his estate, unless its validity be restored by its revivor against his representatives; and hence it does not stop the running of the statute of limitations so far as his estate is concerned.

D. MOXLEY and BARKER & WOODS for appellant.

1. Where the question of whether an execution is sufficiently vital to furnish a point from which to measure the statute of

Digitized by Google

limitation the execution is held merely voidable, and the statute of limitation suspended.

2. The issue of the execution is a ministerial act done by the clerk without notice to the defendant, and the only question of what shall be done under the execution can be controlled by the defendant, or is affected by his being alive or dead.

3. The court cannot fail to observe, if it reads the cases, that while an execution is often spoken of as void, it is void as to passing title, or as to the levy, or sale, but that where the question has arisen as to limitation the courts hold it good to that extent—voidable only.

AUTHORITIES CITED.

Alexander v. Mullins, 16 Ky. Law Rep., 31; Burge v. Brown, 5 Bush, 535; Morgan v. Winn, 17 B. M., 233; Code 407; Civil Code, sec. 401, 407; Deppen, &c., v. Immohr's Ex'r, 27 Ky. Law Rep., 43; Spalding v. Wathen, 7 Bush, 661; Hord v. Marshall, 5 Dana, 495; McDonalds, &c., v. Steinbridge's Adm'r, 25 Ky. Law Rep., 962; 19 Rhode Island, 717, Hodges v. White; Elliott v. Knott, 14 Md.; Halsey v. Van Vliet, 27 Kans., 481; Speer v. Sample, 4 Watts, 367; Hodges v. White, 1897, 19 R. I., 717; Webb v. Mallard, 27 Tex., 80; Taylor v. Snow, 47 Tex., 462; Jones v. Davis, 24 Wis., 229.

WARWICK MILLER and MILLER & SPALDING, attorneys for appellee.

POINTS AND CITATION OF AUTHORITIES.

1. An execution issued against the defendant who died after judgment and before execution issued, there being no revivor against their heirs or personal representative is a nullity, is void and of no effect. (American & English Encyclopedia of Law, 2nd Edition, page 612; Encyclopedia of Pleading and Practice, page 329; Cyc., vol. 17, page 991; Editorial Note, 61st L. R. A., page 353, section 6, Davis v. Young, 2nd T. B. Mon., 60; Briston v. Peyton's Admx., 2nd T. B. Mon., 91; Calloway's heirs v. Eubanks & Sons, 4th J. J. Mar., 279; Thomas, &c., v. Turner, 6th T. B. Mon., 57.)

2. Said execution being void, and more than fifteen years having elapsed since a former execution, the statute of limitation applies, and prevents the judgment from being revived. (Statute of Kentucky, section 2514.)

3. The motion to revive was properly overruled, because a greater length of time had elapsed between the death of the

Digitized by Google

defendant and the date of the motion to revive than is allowed by the Code for revivor. (Hale v. Commonwealth, 24 Ky. Law Rep., 1573; Apperson v. Fulkerson, 7 Ky. Law Rep., 452; Yowel, &c., v. Hustonville, &c., 16 Ky. Law Rep., 30.)

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

On October 9, 1885, the People's Bank of Kentucky recovered a judgment in the Louisville Chancery Court against James P. Barbour, Richard N. Barbour, and J. D. Barbour for the sum of $5,000. An execution was issued on the judgment on April 14, 1888, which was returned no property found. After this the bank assigned the judgment to W. H. Slaughter, and he on November 14, 1899, assigned it to Elizabeth O'Nora Barbour. Richard N. Barbour died February 22, 1902, and on April 13, 1903, Elizabeth O'Nora Barbour had an execution issued on the judgment against James P. Barbour, Richard N. Barbour, and J. D. Barbour, which was levied on their interest in a certain tract of land in Jefferson county. On the 19th of October, 1905, Elizabeth O'Nora Barbour, upon notice to Martha C. Barbour and Mattie C. Barbour, the real representatives of Richard N. Barbour, moved the court to revive the judgment against them. The court overruled the motion, and she appeals.

By section 2514, Ky. Stat., 1903, an action upon a judgment or decree of any court of this State must be commenced within 15 years after the cause of action first accrued, the period to be computed from the date of the last execution thereon. The judgment was recovered in 1885. An execution, as stated, was issued on it on April 14, 1888, but this was more than 15 years before the motion before us was made. An execution was last issued on the judgment on April

Digitized by Google

13, 1903, but this was after the death of Richard N. Barbour, and the question is whether this execution was void as to him. When the defendant in a judgment dies, the judgment dies with him, and is no longer in force until it is revived as to him. Being dead, no acts done under it as to him can be justified by its authority. Vitality may be restored to it by revivor against his representatives, but until it is so revived it cannot be enforced against them. While there is some conflict of authority on the question, the great weight of authority is to the effect that an execution on a judgment after the death of a single defendant and without revivor is void. Davis v. Young, 2 T. B. Mon. 60; Thomas v. Tanner, 6 T. B. Mon. 52; Calloway's Heirs v. Eubanks, 4 J. J. Marsh. 280; Huston v. Duncan, 1 Bush 205; 1 Freeman on Executions, section 35; note to Hatcher v. Lord, 61 L. R. A. 393. While there is some conflict of authority as to the execution being void in the case of the death of a single defendant, where it is issued after his death without revivor, the authorities are more harmonious where the judgment is against several, and by statute after the death of one of the defendants execution may issue against the survivors.

Section 405 of the Civil Code of Practice provides: "The death of a defendant shall not prevent the issuing of an execution against a surviving defendant." In 1 Freeman on Executions, section 36, it is said: "When one of several judgment defendants dies, satisfaction may be sought solely by seizing the persons or levying on the personal estate of the survivors, in which cases no scire facias is needful to authorize the issue of execution. But it is otherwise if the heir of the deceased is to be pursued. In order that the execution may conform to the judgment, it issues against all the defendants, although it, for all practical pur-

Digitized by Google

poses, amounts to no more than an execution against the survivors." See, to same effect, note to Hatcher v. Lord, 61 L. R. A. 387. Under these authorities, the execution which issued on April 13, 1903, was only an execution against the survivors. It was not an execution which had any legal vitality as to Richard N. Barbour. Being void as to him, it was a nullity so far as his estate was concerned; and, being a nullity as to him, it did not stop the running of the statute of limitations.

Judgment affirmed.

CASE 70.—PROSECUTION AGAINST THE INTERNATIONAL HARVESTER COMPANY OF AMERICA, FOR UNLAWFUL COMBINATION TO FIX PRICE OF MACHINES.—February 6.

124 543
128 154

International Harvester Co. of America v. Commonwealth

Appeal from Trimble Circuit Court.

R. F. PEAK, Circuit Judge.

Defendant convicted and appeals. Affirmed.

1. Indictments—Description of Offense—Sufficiency.—Where the words of a statute are descriptive of the offense, an indictment thereunder will be sufficient if it follow the language of the statute.
2. Error in Name—Correction on Record.—Under section 125, Criminal Code, providing that "an error in the name of the defendant shall not vitiate the indictment if the true name be discovered and an entry made on the record," an indictment returned against the "International Harvester Machine Co.," when its true name was the "International Harvester

Digitized by Google

Co., of America," which was corrected on the record by order of the trial court, the proceedings thereon were valid under the Code.

3. Pools and Trusts—Combination—Fixing Prices—Evidence—On the trial of an indictment for a violation of Ky. Stats., section 3915, prohibiting a combination having for its object the fixing, regulating or controlling the price of merchandise, manufactured articles or property of any kind sold in this State, and fixing a punishment therefor, where the evidence shows that a general agent had charge of five competing harvesting machine companies for certain counties in Kentnucky and Indiana, for which he was authorized to establish and did establish separate agents for the sale of each machine, at a fixed price, which was the same for each of them, at which price the local agents were each to account to the company for which he was selling, and neither was to sell outside of his territory on pain of forfeiture of his commission, Held—That this evidence was sufficient to authorize the jury to find the defendant guilty under the statutes.

4. Foreign Corporations—Jurisdiction—Beginning and Completion of Offense.—While the Legislature of this State has no extra-territorial power to punish crime, if a foreign corporation doing business in this State enters into or becomes a member of a pool or trust, beyond the limits of this State, to fix the price of property in this State, then the crime, put in motion in the foreign state, becomes complete in this State, when committed here in pursuance to the conspiracy formed in a foreign state; and this applies to corporations whether organized in or out of this State.

WILLIS & TODD, attorneys for appellant.

N. B. HAYS, Attorney General, and CHAS. H. MORRIS, for the Commonwealth.

(No briefs—record out of office.)

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

The indictment in this case charged the appellant of having entered into combination for the purpose of fixing the price of manufactured articles prohibited by section 3915 of the Kentucky Statutes of 1903, which reads as follows, to-wit: "That if any corpora-

Digitized by Google

tion under the laws of Kentucky, or under the laws of any other State or country, for transacting or conducting any kind of business in this State, or any partnership, company, firm or individual, or other association of persons, shall create, establish, organize or enter into, or become a member of, or a party to, or in any way interested in any pool, trust, combine, agreement, confederation or understanding with any other corporation, partnership, individual or person, or association of persons, for the purpose of regulating or controlling or fixing the price of any merchandise,, manufactured articles or property of any kind, or shall enter into, become a member of, or a party to or in any way interested in any pool, agreement, contract, understanding, combination or confederation, having for its object the fixing, or in any way limiting the amount or quantity or any article of property, commodity or merchandise to be produced or manufactured, mined, bought or sold, shall be deemed guilty of the crime of conspiracy, and punished therefor as provided in the subsequent sections of this act." The indictment follows the language of the statute, which describes the offense with sufficient certainty to enable the appellant to know the offense charged. Where the words of the statute are descriptive of the offense, the indictment will be sufficient if it follows the language of the statute. See Moore v. Commonwealth, 92 Ky. 630, 13 Ky. Law Rep. 738, 18 S. W. 833, Commonwealth v. Ward, 92 Ky. 158, 13 Ky. Law Rep. 422, 17 S. W. 283, and Commonwealth v. Grinstead & Tinsley, 55 S. W. 720, 21 Ky. Law Rep. 1444. The punishment for the violation of this statute is fixed by section 3917 of Kentucky Statutes at a sum not less than $500 and not more than $5,000. Upon the trial of the case the appellant was convicted and the punishment fixed

Digitized by Google

by the jury at $2,000. The appellant seeks a reversal and assigns the following errors: First, because the indictment, as returned, was not against the appellant in its corporate name; second, there was no evidence heard on the trial showing that appellant had committed any offense under the statute; third, that instruction No. 1 given for the commonwealth was erroneous and prejudicial to the appellant; four, that the court erred in refusing to give instructions A and B offered by it. We will consider the alleged errors in the order stated.

The indictment, as drawn and presented by the grand jury, charged the "International Harvester Machine Company" with the offense therein set out. when the true name of the appellant was "International Harvester Company of America." Section 125 of the Criminal Code of Practice provides as follows, viz.: "An error as to the name of the defendant shall not vitiate the indictment, nor proceedings thereon, and if his true name be discovered at any time before execution, an entry shall be made on the record of the court of his true name, referring to the fact of his being indicted by the name mentioned in the indictment, and the subsequent proceedings shall be in the true name." This was corrected by order of the court as provided in this section. While the order of the court was not artfully drawn, it substantially met the requirements of the Code. See Commonwealth v. Kelcher, 3 Metc., 485; Robinson v. Commonwealth, 88 Ky. 386, 11 S. W. 210, 10 Ky. Law Rep. 972, and Commonwealth v. Jenkins, 115 Ky. 62, 72 S. W. 363, 24 Ky. Law Rep. 1881. Appellant's counsel contends that this section of the Code is not applicable to corporations; that there is a very great difference between the individual and the corporation; the name does not constitute the individual, while the name is

Digitized by Google

the life and existence of the corporation; that it is immaterial by what name a person is indicted, prosecuted, and punished because it is the individual that is punished; that, when corporations are created, a name must be given to it, and by that name only must it sue and be sued and do all legal acts. The law knows the corporation only by its corporate name. This reasoning may be technically correct; and the General Assembly, comprehending that fact, enacted section 457 of the Kentucky Statutes of 1903 and section 732 of the Civil Code of Practice, which provides that the word "person" may include a corporation.

The second assignment of error presented by appellant requires a brief discussion of the evidence produced upon the trial. There were only three witnesses who testified, to-wit, N. E. Furlong, appellant's general agent or manager for a district composed of 45 counties in Kentucky and 11 in Indiana, and two or three sales agents in Trimble county, Kentucky. Furlong testified that he was in full charge of appellant's agency in Louisville, Ky., which covered the territory above mentioned; that he had been in charge since the agency was established about the year 1902; that shortly before he took charge of the agency that he was a traveling agent in this State for the McCormick Harvester Company and had been such for about nine years; that during that time the following companies or corporations had established agencies in this State and sold harvesting machinery in competition with each other and the McCormick machine, to-wit.: The Champion by Warner, Bushnell & Co., Springfield, Ohio; Deering machine of the Deering Harvester Company, Chicago, Ill.; the Plano machine by the Plano Manufacturer, Plano, Ill.; the Milwaukee machine by the Milwaukee Harvester Machine Company, Milwaukee, Wis., and the Osborn machine, the resi-

Digitized by Google

dence of the last-named machine not being stated. The witness stated that there was sharp competition between the agents handling these machines during that time; that he was notified by letter, or in some manner, that the McCormick Company had sold out, and soon after that he was employed by the appellant and took the management of its business for the territory stated. He also stated that his information was that all of the machines named were still manufactured in the names of the original owners and at the places stated; that, when he became the manager of the appellant, he was placed in charge of all these machines and was given the exclusive and sole right to sell them, and to establish agencies within the territory, and make and enter into contracts with the agents. He stated that he established three agencies which he believed were in Trimble county—one with Peak, Wentworth & Co., one with Joyce & Co., and the other with Engleman. These contracts, as well as others made throughout the territory, were precisely alike and fixed the same price at which each machine was to be sold and for which price the agents were to account to the company. The contract with Peak, Wentworth & Co. was filed as part of the evidence. The fifth clause of it contains the following: "To sell all machines or property received under this contract at such prices and on such terms as may be fixed in writing by said company or its general agent in the territory herein mentioned." Each and every agent obligated himself to sell the machines under this provision of the contract. Soon after the execution of this contract each of the agents received the following, to-wit: "To our Agents: In accordance with clause 5 in our commission contract with you, we suggest the following retail prices for 1905." Then follows the list of machines, giving the prices charged to the

Digitized by Google

agents, and then fixes the prices at which the agents shall sell them, and then continues with matters that have no bearing upon the question at issue. Then continues as follows: "Please understand while the above are not fixed, or arbitrary prices, but are suggested for your benefit, we shall exhaust all honorable means in our power to have each and every local agent within our jurisdiction be governed by the above prices, for the reason that we are more anxious to have our agents make a legitimate profit on what machines they sell, as we are well aware of the fact that unless an agent can make profit on his machine business he will soon lose interest in pushing the sale of our goods." The contracts with these sales agents confined them to certain territory, and stipulate that, if they sold outside of this territory, their commission should be paid to the agent within that territory. In view of these facts, it is plain that there was no opportunity for competition between the owners and the agents representing these machines. The appellant, or some one, fixed the prices on all of them to the sales agents, and bound the sales agents to sell the machines on terms and for such prices as might thereafter be fixed in writing by the company or its general agent, and then bound the agents not to sell in each other's territory upon the pain of losing their commission. With these facts proven, we cannot say that there was no evidence to authorize a jury to find that the appellant had entered into an agreement with the owners of these machines named, or some one, to fix the price at which all the machines should be sold to the agents and farmers.

Appellant contends that the instruction gave the Trimble circuit court extraterritorial jurisdiction. In other words, counsel says that it authorized the jury to find appellant guilty for an offense committed out-

Digitized by Google

side of the State. In this he is mistaken; for the court told the jury, in effect, that they could not find against appellant unless they further believe from the evidence beyond a reasonable doubt that appellant committed the offense charged in Trimble county within 12 months before the finding of the indictment. The Legislature has not extraterritorial power to punish crime. The crime specified in the statute is the entering into, becoming a member of, or party to, any pool, trust ,etc., to fix the prices at which property may be sold in this State. If a foreign corporation doing business in this State enters into or becomes a member of a pool or trust beyond the limits of this State, then the crime is clearly committed beyond the limits of this State, unless the pool or trust is to fix the prices of property in this State, in which event the crime put in motion in the foreign State took effect and became complete in Kentucky. If the conspiracy is formed in another State to burn or destroy property in this State, the crime becomes complete when the property is destroyed, and the courts of this State would have the right to punish all of the conspirators, even though but one of them crossed the line and destroyed the property, provided he was acting in pursuance of the conspiracy. The General Assembly has the right to pass laws for the protection of the people of this State, and it enacted the statute referred to, and made it applicable to all corporations, whether organized in it or out of it, and to all persons and associations of persons, but the statute cannot apply unless the offense is committed within this State. 8 Cyc. 687, lays down the rule as follows: "The venue in an indictment for conspiracy may be laid in the county in which the agreement was entered into, or in any county in which any overt act was done by one of the conspirators in furtherance of the common de-

Digitized by Google

sign. If the conspiracy is entered into within the jurisdiction of the court, the parties thereto are triable in that jurisdiction, notwithstanding the offense was to be committed without the jurisdiction; and, if a conspiracy is formed without the jurisdiction, an overt act committed by one of the conspirators within the jurisdiction is evidence of the crime within the jurisdiction where the overt act is committed." In the case of the People v. Mather (N. Y.), 21 Am. Dec. 146, the court said: "In indictments for conspiracy the venue may be laid in any county in which it can be proven that any overt act was done by any one of the conspirators in furtherance of their common design." Archb. Crim., p. 6. Then refers to several cases, and continues: "All these cases must proceed, I think, on the principle that the crime is committed where the overt act is performed. I admit that it is the illegal agreement that constitutes the crime. When this is concluded, the crime is perfect, and the conspirators may be convicted if the crime can be proved. No overt act need be shown, or even performed, to authorize a conviction. If conspirators enter into the illegal agreement in one county, the crime is perpetrated there, and they may be immediately prosecuted; but the proceeding against them must be in that county. If they go into another county to execute their plans of mischief, and there commit an overt act, they may be punished in the latter county without any evidence of an express renewal of their agreement. The law considers that wherever they act that they renew, or, perhaps, to speak more properly, they continue their agreement, and this agreement is renewed or continued as to all whenever any one of them does an act in furtherance of their common design. * * * It necessarily follows that whenever a new party concurs in the plans originally formed, and comes in to aid in

Digitized by Google

the execution of them, he is from that moment a fellow conspirator. He commits the offense whenever he agrees to become a party to the transaction, and does any act in furtherance of the original design."

From the evidence it is certain that there was a combination or agreement, to fix the price of these machines referred to, entered into by the owners thereof, and possibly others. It is pretty certain that that agreement was made outside of this State, and if they had never come into this State to execute the agreement, or any part of it, they would not be liable to punishment here; but the proof shows that they were executing the agreement in this State, and possibly the agent of appellant, in this State, entered into the combination or agreement, after they entered this State, to carry out the agreement, and under the authority referred to such agent occupied the same position as the original parties to the unlawful agreement.

What we have said about instruction No. 1 obviates the necessity of a discussion of the instructions offered by the appellant.

At the last session of the General Assembly, in 1906, it enacted a statute to make it legal for farmers to unite and pool their crops, etc. The appellant claims that act is unconstitutional, and has the effect to make all of the statutes on the subject of pool, trust, combination, etc., unconstitutional. It is not necessary to determine this question, as the offense charged in the indictment was committed and the indictment found long before that act was passed. See section 465 of Kentucky Statutes of 1903, which reads as follows: "No new law shall be construed to repeal a former law as to any offense committed against the former law, nor as to any act done, any penalty, forfeiture, or punishment incurred, or any right accrued or claim

Digitized by Google

arising under the former law, or in any way whatever to affect any such offense or act so committed or done. or any penalty, forfeiture, or punishment so incurred, or any right accrued or claim arising before the new law takes effect." See, also, the case of Commonwealth v. Overby, 107 Ky. 169, 21 Ky. Law Rep. 843, 53 S. W. 36.

For these reasons, the judgment of the lower court is affirmed.

CASE 71.—ACTION BY W. K. ELLIOTT AND OTHERS AGAINST SARAH P. LESLIE INVOLVING A SETTLEMENT OF THE ESTATE OF JAMES H. LESLIE.—February 7.

Elliott, &c., v. Leslie

Appeal from Pike Circuit Court.

A. J. KIRK, Circuit Judge.

From the judgment both parties appeal. Affirmed.

Parent and Child—Contract—Interest in Parents Estate—Sale—Validity—Advancement.—An agreement in writing between a father and son which recites: "in order to settle a suit between them and avoid litigation, and in consideration that my father has this day given me in cash $1,000 which I accept in full of all my present or future interest in his estate," is not an enforceable contract; but in the settlement of the fathers estate the sum of $1,000 should be charged to the son as an advancement, whether it was so intended by the father or not.

YORK & JOHNSON for appellants.

Digitized by Google

The policy of the law is to uphold family settlements of law suits, and upon this proposition authorities are unnecessary.

M. W. MAYNARD, JAMES M. ROBERSON and E. D. STEPHENSON, attorneys for appellees.

PROPOSITION AFFIRMED.

1. The release or attempted sale by T. J. Leslie to his father of his present or future interest in his estate is not binding, because it was a sale of an expectancy and therefore void. See: (Wheeler v. Wheeler, 2 Met., 474; Beard v. Griggs, 1 J. J. Mar., 22; McCall v. Hampton, 98 Ky., 166.)

2. When fraud, oppression or unfair advantage appears in the sale, it will not be enforced. See: (McCall v. Hampton, supra; Wheeler v. Wheeler, supra; and Pomeroy's Eq. Jur., sec. 953.)

3. The $1,000.00 was paid to T. J. Leslie in consideration of the compromise of the law suit and should not be charged to T. J. Leslie as an advancement.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

In 1899 James H. Leslie died intestate. He left surviving him several children and grandchildren. The only property he owned at his death was some real estate worth probably $3,000. An action was brought to have this real estate sold, and the proceeds divided among his heirs, and also for the purpose of settling his estate. This controversy is between the children of T. J. Leslie—a son of James H. Leslie—and the other heirs. In 1889 T. J. Leslie executed to his father the following contract, which was put to record in the clerk's office of the Pike county court: "Whereas, there is an unfortunate suit pending in the Pike circuit court of my father, James H. Leslie, against me; now, in order to settle said suit and avoid litigation, and in consideration that my father has this day given and paid to me in cash one thousand dollars, which I accept in full of all my present

Digitized by Google

and future interest in my father's estate, whether real, personal or mixed, and I hereby forever acquit, release and relinquish all right or claim to or in his estate, and will not claim any part of his estate as against him or any of his heirs or devisees. The payment as above stated is to be in full of any future interest in his said estate. The said J. H. Leslie is to pay the legal cost of suit between us, but not my lawyer's fee. This does not include my interest in my mother's estate." The children of T. J. Leslie insist: First, that this writing does not estop them from asserting their right to their father's interest in the estate of James H. Leslie; second, that the $1,000 mentioned in the writing should not be charged to them as an advancement, because it was paid as a compromise in settlement of a lawsuit at the time pending between their father and James H. Leslie. The other heirs contend that this writing was a valid agreement between T. J. Leslie and his father, and that, under its provisions, neither T. J. Leslie nor his children are entitled to any interest in the estate left by James H. Leslie. The chancellor held that the $1,000 mentioned in this agreement should be charged to T. J. Leslie as an advancement, and from this judgment both parties appeal.

It appears from the record that James H. Leslie had made advancements to all of his children, aggregating approximately about $1,200 each, so that T. J. Leslie received from his father practically the same amount as the other children. We do not consider it necessary to look into the question whether or not this writing was executed as a compromise, or to examine the purpose of its execution. It may be conceded that it was fairly entered into, and that by its terms T. J. Leslie attempted to accept the $1,000 in full satisfaction of all his prospective interest in the estate of his

Digitized by Google

father. Viewing the paper from this standpoint, we will proceed to inquire into its validity for the purpose intended.

On more than one occasion this court has been called upon to pass upon the sufficiency of writings executed by a child conveying his prospective or anticipated interest in his parent's estate to another person, and, with two exceptions that will be noticed, has held that the attempted conveyance had no binding force or effect. Thus, in McCall's Admr. v. Hampton, 98 Ky. 166, 17 Ky. Law Rep. 713, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 335, Wade Hampton sold and conveyed with covenant of general warranty all the right and interest that he might thereafter become entitled to in his father's estate to his brother Charles H. Hampton. After the death of the father, a creditor of Wade Hampton sought to subject his interest in his father's estate to the payment of his debt. Charles H. Hampton asserted title to it under the deed made by his brother, and it was held that the interest of Wade Hampton did not pass by the deed, and that the creditor was entitled to subject it to the payment of his debt. To the same effect is Alves v. Schlesinger, 81 Ky. 290, 5 Ky. Law Rep. 280; Wheeler's Exrs. v. Wheeler, 2 Metc. 474, 74 Am. Dec. 421. It may be remarked that in neither of these cases did the parent execute any writing consenting to the conveyance, although in each of them it appeared that he had verbally assented to it. And some importance appears to have been attached by the court to the fact that no writing was executed by the parent consenting to the conveyance. In Lee's Exr. v. Lee, 2 Duv. 134, one child purchased from another his interest in the estate of his father; the father agreed to the arrangement, and executed a writing obligating himself to give to the son who had

Digitized by Google

purchased that part of his estate that he had intended to bequeath to the child who sold—this writing being signed by the parent, as well as the child who sold his interest. It was held that by the writing the son parted with all his interest in his father's estate. In McBee v. Myers, 4 Bush, 356, Mrs. Craig, a daughter of McBee, with the consent of her father, sold to her brother Walter McBee all her right and interest in his father's estate. The father also executed a paper in which he affirmed his consent to the sale, and agreed to give Walter McBee the land intended for his daughter. The father having died intestate, Walter McBee was held entitled to the interest of Mrs. Craig in his estate. It will thus be seen that this court has held contracts of this kind binding when they were entered into with the written consent of the parent, but that without such consent they did not operate to divest the heir of his interest.

As an original proposition, it is difficult to understand upon what ground sales of expectancies of this character can be sustained, especially when it is kept in mind as a fundamental principle necessary to the validity of every bargain and sale that there must be a grantor, a grantee, and a thing in being to be granted. It may be said, however, that the courts generally are disposed to uphold the validity of these contracts, when they are evidenced by writing, signed by the parent, and fairly executed, free from any semblance of fraud or overreaching. In elaborate notes to Garcelon's Estate (Cal.), 38 Pac. 414, 32 L. R. A., 595, 43 Am. St. Rep. 134, and McCall's Admr. v. Hampton, 98 Ky. 166, 17 Ky. Law Rep. 713, 32 S. W. 406, 33 L. R. A. 266, 56 Am. St. Rep. 358, the authorities upon this subject are fully collected. The fact, however, that courts are reluctant to sustain these contracts, and have hedged them about with as

Digitized by Google

many conditions as possible in order to prevent their enforcement, is strikingly illustrated in all the cases that we have examined. In fact, the impression is left that the doctrine is adhered to on account of the fact that it is generally recognized, rather than because it is based on any sound reason. In Pomeroy's Equity Jurisprudence, section 953, the learned author, whilst stating that contracts of this character are valid and enforceable, remarks: "Heirs, reversioners, and other expectants, during the life-time of their ancestor, are considered as peculiarly liable to imposition and exposed to the temptation and danger of sacrificing their future interest in order to meet their present wants. Being sometimes in actual, but more often in imaginary, distress, they do not stand upon an equal footing with those who deal with them concerning their expectancies of estate. * * * In the second place, the dealings of heirs and reversioners with their expectant interests are often a gross violation of the moral, if not legal, duties which they owe to their ancestors who are the present owners of the property, and from and through whom their future estate will come, and may be a virtual fraud upon the rights of those parties. Equity therefore treats such dealings in expectancies as a possible fraud upon the heirs and reversioners, who are important parties to the transaction, and as a virtual fraud upon their ancestors, life tenants, and other present owners. All dealings by such expectants are not necessarily and absolutely voidable, but in every such conveyance or contract with an heir, reversioner, or expectant a presumption of invalidity arises from the transaction itself. It is not necessary to show, as a condition of relief, that the heir or reversioner was an infant, or that he was in a condition of actual distress when the bargain was made. A court of equity presumes dis-

Digitized by Google

tress. And the very fact of the sale or charge shows prima facie that he was not in a position to make his own terms, and that he submitted to have them dictated to him by the other party." This is not only a just but a vigorous denunciation of the sale of expectancies, and is supported by Story and other writers of recognized ability, and illustrates, as do the individual cases, the suspicion and distrust with which such transactions are viewed. The ground upon which these sales have been upheld is variously stated. Thus, in Ruple v. Bindley, 91 Pa. 296, the court said: "An assignment for a valuable consideration of demands, having at the time no actual existence, but which rests in expectancy only, is valid in equity as an agreement, and takes effect as an assignment when the demands intended to be assigned are subsequently brought into existence." Whilst Mr. Pomeroy, in section 1271, says: "The assignee of an expectancy, possibility, or contingency acquires at once a present equitable right over the future proceeds of an expectancy, possibility, or contingency. * * * There was an equitable ownership of property in abeyance, so to speak, which finally changed into an absolute property upon the happening of the future event. Equity permits the creation and transfer of such an ownership, while the original common law rejected every such notion." And he says, in section 1287: "Mere possibilities or expectancies are, according to the general course of decision, assignable in equity for a valuable consideration, and equity will enforce the assignment when the possibility or expectancy has changed into a vested interest or possession. The explanation is sometimes given that the assignment operates as a contract by the assignor to convey the legal estate or interest when it vests in

Digitized by Google

him, and equity will specifically enforce such contract by decreeing a conveyance."

When it is considered that the heir under the conditions being investigated had no interest or estate whatever in the property of the parent, either remote or contingent, it strikes one at first blush as being out of the question that the bare possibility of having an interest at some future time can be made the subject-matter of a bargain and sale. As said in 2 Fearne on Remainders, 23: "An expectancy or chance is a mere hope, unfounded in any limitation, provision, trust, or legal act whatever, such as the hope which an heir apparent has of succeeding to the ancestor's estate. This is sometimes said to be a bare or mere possibility, and at other times less than a possibility. It is a possibility in the popular sense of the term, but it is less than a possibility in the specific sense of the term 'possibility.' For it is no right at all in contemplation of law even by possibility, because, in the case of a mere expectancy, nothing has been done to create an obligation in any event, and where there is no obligation there can be no right, for right and obligation are correlative terms." We are not disposed to give our assent to a doctrine, however ancient or general it may be, that is rested upon so unsubstantial a foundation as the one that upholds the right of an heir to traffic in something that has no existence, and may never have. Take the case before us as an illustration. Here the child in consideration of $1,000 sells to his parent his interest in the parent's estate, and obligates himself not to assert in the future any claim to it. What did the heir sell? What did he have to sell? Absolutely nothing. What could the father have bought? What was the consideration for a conveyance of this character? The parent, if he saw proper to do so, was not estopped by this paper

Digitized by Google

from giving to the child other estate or property. He had the absolute right to dispose of his property as he pleased, and, if he had chosen to donate to his son, after this contract was made, $1,000 or $5,000, who could question his right to do so? If the parent had made a will and devised to this son a certain portion of his estate, would it be held that the devise was void, and that the father by entering into this agreement had barred himself from distributing his estate according to his wishes? Under our laws, that have been in force with few changes since the establishment of the State, the ancestor has been authorized to dispose of his estate during his life-time by way of advancement, or after his death through the medium of a will. And these methods have become a part of the settled laws of the State, familiar and acceptable to its people. And, if either of these means of disposition is not resorted to, and the owner of an estate dies intestate, the law of descent and distribution at once becomes operative, and, under its wise and salutary provisions, the undevised and undisposed estate is settled on those persons whom the law has selected as the objects of the decedent's bounty. As well said in McCall's Admr. v. Hampton, supra. "Some courts hold that the expectancy of an heir to inherit his father's estate is not an interest capable of assignment in equity any more than at law, and we agree with courts upon the question. It seems at this late day needless to discuss the wisdom and policy of the law which has been sanctioned for so many generations, and we do not feel called upon to defend it. A strict adherence to it will save multiplying contentions, protect the improvident child and heirs at law from fraud and deceit, save free and untrammeled the actions of the possessors of estates in their

Digitized by Google

distribution. If there were no other reasons for adhering to the rule, then those suggested would be all sufficient in our opinion for our doing so."

The conclusions here announced may appear to be in conflict with the cases of Lee's Exr. v. Lee, and McBee v. Myers, but, if so, they are in harmony with the later and sounder utterances of this court as declared in Alves v. Schlesinger and McCall v. Hampton, as well as its judgment in Wheeler's Exrs. v. Wheeler. It seems to us that these latter cases materially modify, if they do not, in fact, overrule, the opinions upholding sales of expectancies when made with the consent of the parent. Indeed, these latter opinions cannot be reconciled with the earlier ones of this court. It is difficult to perceive any substantial difference between a sale of an expectancy without the written consent of the parent, and a sale with his consent. In neither case does the transaction rest upon any consideration, nor is it supported by any enforceable obligation. It is a mere technical distinction, without a sound difference, in keeping with the rule announced by some other courts of last resort that a conveyance of this character will be enforced if made with a covenant of warranty, but otherwise not. We therefore conclude that when the parent, under a contract like the one in question, advances to his child money or property, that it should be charged to the child as an advancement, and this is the sensible, reasonable, and legal effect of it. Under the statute, the intention of the donor is never consulted. It is immaterial whether he intended to charge the heir with the property donated or not, or what his purpose was in making the advancements. This rule will give reasonable effect to contracts of this character when they are entered into, and will carry out the purpose and intention of our laws.

Digitized by Google

The chancellor having charged the amount received under this contract as an advancement, his judgment is affirmed.

CASE 72.—ACTION BY FRANCIS CLARK'S ADMINISTRATOR AGAINST THE FARMERS' NATIONAL BANK OF RICHMOND, KY., INVOLVING THE OWNERSHIP OF A DEMAND BANK DEPOSIT.—February 7.

Clark's Adm'r. v. Farmer's Nat. Bank of Richmond, Ky.

Appeal from Madison Circuit Court.

J. M. BENTON, Circuit Judge.

From the judgment plaintiff appeals. Reversed.

1. Executors and Administrators—Death—To Whom Assets Pass. —Money deposited in a bank to the credit of decedent as executor passed to the administrator de bonis non of the estate of which decedent was executor, and not to the executor's administrator.
2. Banks and Banking—Recovery of Deposits.—No cause of action arises for the recovery of a demand bank deposit until demand for and refusal of payment has been made.
3. Same—Interest.—In the absence of a special contract, a demand bank deposit does not bear interest.

R. H. TOMLINSON and BRECKINRIDGE & BRECKINRIDGE, attorneys for appellant.

1. Although under the common law, an executor of an executor became the executor of the first testator, this rule in this State has long since been abrogated by statute, so that even the executor of an executor cannot now administer the estate of the first testator, but an administrator de bonis non must now be appointed for the estate of the first testator. (Ky. Statutes, section 3890.)

Digitized by Google

2. The fund in question in this case having been placed to Gregory's credit as executor of Francis Clark, could not have been checked upon by Gregory in his individual capacity, nor could it have been subjected to the payment of Gregory's individual debts.

AUTHORITIES CITED.

Civil Code, sec. 113, sub.-sec. 7; Lucas v. Lucas, Adm'r, 18 Ky. Law Rep., 661; McClure v. Bigstaff, 18 Ky. Law Rep., 606; Blackstone Commentaries, vol. 2, page 506; Maraman v. Trunnell, 3 Met., 146; Jones v. Everman, &c., 15 B. Mon., 631; Schoolfield v. Rudd, 9 B Mon., 294; 1 Williams on Executors, 656; National Bank v. Insurance Company, 104 U. S., 54; Gary v. Peoples Nat. Bank, 4 Am. St. Rep., 742.

W. C. BENNETT, attorney for appellee.

1. There is no contention here that an administrator of an executor is entitled to administer upon the estate of the first decedent. But the sole question is as to the right of possession of the money.

2. We insist that an administrator of an executor is entitled to the possession of money which his intestate has collected and held as executor of another decedent.

3. In this case the assets had been administered and converted into money and deposited in bank to the credit of the executor, J. W. Gregory. The title therefore was in J. W. Gregory. True he held it for the benefit of his decedent's estate but the title nevertheless was in him, and upon his death it descended to his personal representative Goodloe.

LIST OF AUTHORITIES CITED.

Slaughter v. Sloan, 5 Mon. 19; Warfield v. Brank, 13 Bush, 77; Smith v. Potts, 3 Rawle, 361; Graves v. Downey, 3 Mon., 353 (355); Carrick v. Carrick, 8 C. E. Green (N. J.) 364; Louisville & Nashville R. R. Co. v. Brantley's Adm'r, 16 Ky. Law Rep., 691; Perry on Trusts, 5th Edition, sec. 264, 344; Amer. & Eng. Enc. of Law, 2nd Edition, vol. 11, pp. 981, 1341; Woerner, The American Law of Administration, Art. 321, 2nd Edition; Schouler's Executors & Administrators, 2nd Edition, sec. 244, and following; Tomason v. Tomason, 1st Met., 51; Norwell v. Norwell, 2 Green., (Me.) 75; Prestige v. Prestige, 28 Miss., 379; Cook v. Burton's Heirs, Bush, 64; White's Adm'r v. Carrico's Adm'r, 2 Met., 232; Donaldson v. Lucas, 117 Ind., 139; Slaymaker v. The Farmer's Bank, 103

Digitized by Google

Pa. St., 616; Sibbs v. Philadelphia Savings Fund Society, 153 Pa. St., 345.

OINION OF THE COURT BY JUDGE BARKER—Reversing.

In 1882, J. W. Gregory, who was then the sole executor of the estate of Francis Clark, deceased, deposited in the Farmers' National Bank of Richmond, Ky., the sum of $500. Afterwards Gregory died, and W. O. Goodloe was appointed and qualified as his administrator. In 1884 Goodloe, as administrator, drew his check on the bank for the sum deposited therein to the credit of his decedent as executor, and the same was paid over to him. Subsequently, in 1904, appellant, W. D. Gregory, was appointed and qualified as administrator de bonis non with the will annexed of Francis Clark, Sr., deceased, and, having demanded of the bank the payment of the $500 theretofore deposited by J. W. Gregory as executor of the estate of his decedent, and payment being refused, he instituted this action. The court overruled a general demurrer of the bank to the petition. Thereupon it filed an answer, controverting some of the allegations of the petition, and pleading, in the second paragraph, the payment of the sum in dispute by W. O. Goodloe, administrator of the estate of J. W. Gregory, deceased. In the third paragraph it pleaded the laches of the plaintiff in instituting this action, and in the fourth pleaded the statute of limitations. The court sustained a general demurrer to the third and fourth paragraphs of the answer, and overruled that to the first and second, the latter of which, as said before, is a plea of payment to the administrator of the executor.

Without discussing in detail the several interesting questions of pleading suggested in the briefs of coun-

Digitized by Google

sel, it may be said that, as we view this case, there is but one substantial question on this appeal, and that is, whether or not the fund involved in this litigation was an asset in the hands of the administrator of the executor, or whether it passed, as an unadministered part of the estate of the original decedent, to the administrator de bonis non. That it was deposited in the bank by the exeutor of Clark to his credit as executor is alleged in the petition. The rule in such cases is that the assets of a decedent, which have not been administered, pass and belong to the administrator de bonis non, and not to the administrator of the administrator. This, as an abstract principle of law, is not disputed. The practical question is what constitutes the administration of assets, as applied to the case before us? Undoubtedly, a great many cases are to be found in the books where the principle is stated generally that all assets remaining in specie pass to the administrator de bonis non, whereas the proceeds of those which have been converted into money vest in the administrator of the administrator, and the right of action against him concerning them vests in the heirs and creditors of the decedent, and not in his administrator de bonis non. Unquestionably, if in the case before us J. W. Gregory had died with the sum in dispute in his own possession, mingled with his own money, the right to sue for it would not be in appellant as administrator de bonis non of Francis Clark, Sr., deceased; but as it was in the bank, deposited to the credit of Gregory as executor, it remains to be seen whether or not funds so held are to be considered as administered or unadministered assets.

A similar question arose in the case of Maraman v. Trunnell, 3 Metc. (Ky.) 146, 77 Am. Dec. 167. There James Caldwell, the administrator of F. Mara-

Digitized by Google

man, deceased, had taken notes for money due his decedent, payable to himself as administrator, and died without collecting them. Afterwards, an administrator de bonis non of the estate of F. Maraman was appointed, and the question arose whether or not Caldwell's administrator, or the administrator de bonis non, was entitled to maintain an action for the collection of the unpaid notes. It was held that the right of action was in the administrator de bonis non, and it was stated as a well-settled rule that in such cases the administrator of the administrator had no title to property so held, unless his decedent had become entitled to it as creditor of his intestate, or by charging himself with it in settlement of the estate; and, where neither of these conditions existed, the title passed to the administrator de bonis non. In the case of Warfield v. Brand's Admr., 13 Bush (Ky.) 77, the doctrine of Maraman v. Trunnell was approved, and it was held that, while an administrator de bonis non could not recover for the wasting of the decedent's estate by the personal representative, or recover money of the first estate which had become mingled with the assets of the personal representative, yet if he had set apart the money, and kept it separate and in a condition to be identified as the property of the estate, then this property passed to the administrator de bonis non. And in that case Judge Cofer, who wrote for the court, cited with approval the case of Beall v. New Mexico, 83 U. S. 539, 21 L. Ed. 292. In the latter case Mr. Justice Bradley, writing for the Supreme Court of the United States, thus stated the rule: "To the administrator de bonis non is committed only the administration of the goods, chattels, and credits of the deceased which have not yet been administered. He is entitled to all the goods and personal estate which remain in specie. Money

Digitized by Google

received by the former executor or administrator, in his character as such, and kept by itself, will be so regarded; but, if mixed with the administrator's own money, it is considered as converted, or, technically speaking, 'administered,' And all assets of the testator or intestate in the hands of third persons at the death of an administrator or executor belong to the administrator de bonis non. Of course, debts and choses in action not reduced to possession belong to this category."

Applying the foregoing principles to the case in hand, we conclude that the sum in controversy having been deposited in the bank to the credit of J. W. Gregory, as executor, places it in the category of unadministered assets of the estate to which it belonged; and, this being true, it follows that the right to collect it passed to the administrator de bonis non, and not to the administrator of the executor, and the payment to W. O. Goodloe was therefore invalid. The bank had notice, by the fact that the money was deposited to the credit of Gregory as executor, that it did not belong to him, and was so set apart that it did not constitute a part of his estate by being mingled with it, and was bound, therefore, to know that the administrator had no right to it. The deposit of the fund was a demand loan to the bank, and no cause of action arose for it until after demand and refusal; nor, in the absence of a special contract, did it bear interest. Assuming that the denials of the first paragraph of the answer placed in issue the allegation that the money in question belonged to the estate of Francis Clark, Sr., deceased, the court should have sustained the demurrer to the plea of payment to the administrator of J. W. Gregory, and tried out the question whether the money did or did not belong to the estate of Francis Clark, Sr., and awarded judg-

Digitized by Google

ment for the party in whose favor this issue was determined.

The judgment is reversed for proceedings consistent herewith.

CASE 73.—ACTION BY FELIX DE LANG AGAINST THE ILLINOIS LIFE INSURANCE COMPANY TO RECOVER ON A POLICY ON THE LIFE OF HIS DECEASED SON.—February 8.

Illinois Life Ins. Co. v. De Lang

Appeal from Jefferson Circuit Court (C. P. Branch, Second Division).

THOMAS R. GORDON, Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Life Insurance—Application—False Statements—Instructions to Jury.—In an action on an insurance policy of one, who, on the trial is shown to have had tuberculosis prior to the issual of his policy, and who died thereof within a year thereafter. and who in his application stated that "neither he nor his parents, grand parents, uncles, aunts, brothers or sisters had ever had consumption in any form," it was error in the court to instruct the jury "to find for the plaintiff unless you believe from the evidence that the answers to the questions in the application, or some of them, were, without the knowledge of the company, untrue in some particulars, in which true answers would have stated facts or conditions which were reasonable and ordinarily calculated to shorten life or increase the probability of death of the insured, or which if known to the defendant company, it, acting naturally and reasonably, would not have entered into the policy contract."
2. Same.—The jury is not to judge whether if the truth had been stated, facts or conditions would have been disclosed, which

Digitized by Google

were reasonably and ordinarily calculated to shorten life or increase the probability of the death of the insured, nor is it to determine whether if these matters had been disclosed the company, acting reasonably and naturally would have issued the policy.

3. Same.—The court should have set out in the instruction the questions and answers set out in the application and should then have told the jury that if these answers or any of them were substantially untrue, and if according to the usual course of the insurance business, the application would not have been accepted and the policy issued if the truth had been stated therein, they should find for the defendant, otherwise they should find for the plaintiff.

4. Evidence—Wife of Insured—Competency—On the trial of an action against an insurance company on a policy issued to a father on the life of his son, the wife of the deceased son is a competent witness as to the health of her husband, or as to any matters not involving communications between her and her husband growing out of the marital relation.

5. Expert Testimony.—On the trial of an insurance case as to whether the insured had consumption, no witness, not an expert, should be allowed to state his opinion that the insured had or had not consumption, or that he was in good or bad health. Such non-expert witnesses may tell what symptoms they saw, and let the jury determine what these symptoms indicated.

KAHN, BAIRD & SPINDLE, LONG & PRICE, and STANLEY E. SLOSS, for appellant.

POINTS AND AUTHORITIES.

1. Misrepresentations are material if the fact concealed increases the risk, i. e., if the prudent underwriter would have refused to make the contract at the same premium, if he had known the truth. (Provident Savings v. Whayne, 29 Ky. Law Rep., 160 to 165.

2. The question for the jury is, "what would the prudent underwriter, knowing the truth when passing upon the application, have done?" and not what the jury, passing upon the question after the death of insured may think would have been "natural or reasonable." (Provident Savings, etc., v. Whayne, 29 Ky. Law Rep., 167.)

3. The misrepresentation avoids even if the concealed fact did not contribute to the loss, if it in fact increased the risk.

Digitized by Google

(Provident v. Whayne, 29 Ky. Law Rep., 164; Brown v. Greenfield, etc., 53 N. E., 129, 132.)

4. Erroneous instruction given by the court of its own motion is reversible error, even if appellant did not ask any instruction, so long as he did not lead the court into the error. (South Covington v. Core, decided October 3, 1906; L. & N. v. Roberts, 25 Ky. Law Rep., 438; Railroad v. Hooe, 18 Ky. Law Rep., 522; Swope v. Schaefer, 9 Ky. Law Rep., 160; Blashfield on Instructions, section 133; Hice v. Woodman, 34 N. C., 293; 11 Ency. Pl: & Pr., 216.)

5. This court has held some misrepresentations so palpably material, as that the court must hold them material in law, and must not leave them to the jury. (Metropolitan v. Schmidt, 29 Ky. Law Rep., 255; Provident v. Dees, 27 Ky. Law Rep., 670; American Aid v. Bronger, 12 Ky. Law Rep., 284; Union Central v. Lee, 20 Ky. Law Rep., 839; Mutual Life v. Thompson, 94 Ky., 253; and so in many other courts; Lutz v. Insurance Co., 40 Atl., 1104; March v. Ins. Co., 40 Atl., 1100 (Pa.); Carrolton, etc. v. American, etc., 115 Fed., 77; Fidelity Mut. v. Miller, 92 Fed., 63; Rainger v. Boston Life, 44 N. E., 1088 (Mass.); Brown v. Greenfield, 53 N. E., 129; Dolan v. Mutual Reserve, 53 N. E., 398; Royal Neighbors v. Wallace, 89 N. W., 758 (Mich.); McGovern v. Supreme Order, 80 N. W., 603 (Wis.); Hartford Life v. Gray, 91 Ill., 159; Finch v. Modern Woodmen, 71 N. W., 1104 (Mich.); Ferris v. Home Life, 76 N. W., 1041.-

6. Tuberculosis increases the risk and is material as matter of law, and the court should so rule. (Brown v. Greenfield, 53 N. E., 129, 131; Royal Neighbors v. Wallace, 89 N. W., 758, 102 N. W., 1020; Metropolitan v. Dempsey, 19 Atl., 642; Murphy v. Prudential, 55 Atl., 19, and many others cited in brief.)

7. So as to use of liquor to excess. (Rainger v. Boston Mut., 44 N. E., 1088; Provident v. Dees, 27 Ky. Law Rep., 670; Union Central v. Lee, 20 Ky. Law Rep., 839; Mutual Life v. Thompson, 94 Ky., 253; Hews v. Equitable, 143 Fed., 850; Mengel v. Ins. Co., 35 Atl., 197.)

8. So as to attendance of physicians. (Society v. O'Hara, 120 Penn., 257; Provident v. Reutlinger, 25 S. W., 375; Wall v. Royal Society, 36 Atl., 748; and many others cited in brief.)

9. So as to heart disease. (Metropolitan v. Moravec, 73 N. E., 415.)

(a) And other serious diseases. (Maine Benefit v. Parkes, 81 Me., 97; Hann v. National Union, 56 N. W., 834; Metropolitan v. Schmidt, 29 Ky. Law Rep., 255.)

(b) And pregnancy. (Satterlee v. Modern Brotherhood, 106 N. W., 561.)

Digitized by Google

10. The misrepresentations were established by affirmative evidence and by admissions of insured prior to his application. Opposing this there was only negative evidence, and opinions of experts. These did not constitute a scintilla of evidence, and the motion for a peremptory instruction should have been sustained. (L. & N. v. Mounce, 28 Ky. Law Rep., 933; L. H. & St. L. v. Jolly, 28 Ky. Law Rep., 989; Kerr v. De Laney, 28 Ky. Law Rep., 1140.)

11. Opinion evidence can not override and does not contradict positive testimony as to the facts. (Cohn v. Costa, 15 La. Ann., 612; Paty v. Martin, ib. 620; Pannell v. Warehouse Co., 113 Ky., 630; L., H. & St. L. v. Jolly, 28 Ky. Law Rep., 993; Champ v. Commonwealth, 2 Met., 17; Johnson v. Turnbull, 130 Fed., 769; Burley v. McGough, 3 N. E. 738.-

12. So of negative evidence. (Stitt v. Huidekopper, 17 Wall., 384; B. & O. v. Baldwin, 144 Fed., 53, and ca. ci.)

13. Opinions of lay witnesses are inadmissible, unless they state the facts. (Pannell v. Warehouse Co., 113 Ky., 630; Hunt v. Hunt, 3 B. M., 575; American Accident Co. v. Fidler, 18 Ky. Law Rep., 161.)

14. Verdict is flagrantly against evidence, and should be set aside. (Hurt v. L. & N., 116 Ky., 545; L., H. & St. L. v. Hall, 29 Ky. Law Rep., 585; L. & E. v. Gilliland, 24 Ky. Law Rep., 2081; M. & O. v. Reeves, 25 Ky. Law Rep., 2236; L. & N. v. Carter, 23 Ky. Law Rep., 2017; L. & N. v. Hall, 115 Ky., 567.)

15. Admissions of insured are competent evidence against beneficiary.

(a) To prove knowledge on part of insured. (Hews v. Equitable, 143 Fed., 850; Towne v. Towne, 61 N. E., 426; 1 Wigmore on Evidence, section 266; Dilliber v. Home Life, 69 N. Y., 256.)

(b) As part of the res gestae. (Provident v. Whayne, 29 Ky. Law Rep., 169; Manhattan v. Meyer, 109 Ky., 372; Hews v. Equitable, 143 Fed., 850; Swift v. Mass. Mut., 63 N. Y., 186; Ashbury Life v. Warren, 66 Me., 523; Rogers v. Manhattan, 71 Pac., 348; Dolan v. Mutual Reserve, 53 N. E., 398; Mutual Life v. Hillmon, 145 U. S., 285; Smith v. National Benefit, 123 N. Y., 85.)

(c) The policy reserved to insured the right to change the beneficiary, and appellee as beneficiary had no vested interest but a mere contingency. (Hopkins v. Hopkins, 92 Ky., 324; Mutual Life v. Twyman, 28 Ky. Law Rep., 1153; Crice v. Mutual Life, 29 Ky. Law Rep., 91.)

16. Under such circumstances statements of insured before his application are admissible against his beneficiary, just as they would be against his estate if it were the beneficiary, as substantive evidence of the state of his health. (Smith v. National, 51 Hun., 575; Steinhausen v. Preferred, 59 Hun., 336; Terwilliger

Digitized by Google

v. Industrial, 83 Hun., 320; Thomas v. Grand Lodge, 41 Pac., 882; Fidelity, etc., v. Winn, 33 S. W., 1045; Supreme Conclave v. O'Connell, 32 S. E., 946.)

17. A favorable report of the medical examiner does not preclude the company from showing that insured was ill before the date of his application, where the misrepresentations of insured deceived the examiner.

The company had no knowledge that the representations were untrue. (Gailbreath v. Arlington, 12 Bush, 29.)

18. Such investigation as it made does not take away its right to rely on insured's representations where it in fact relied on them. (Bispham Equity, section 215; 14 A. & E. Ency. of Law, 214; Foley v. Holtry, 43 Neb., 133; Perkins v. Rice Litt. Sel. Cases, 218; Am. Mut. v. Bronger, 12 Ky. Law Rep., 284.)

19. It was error to allow non-expert witnesses to testify that insured was in good health, without describing the symptoms observed by them. (Hunt v. Hunt, 3 B. M., 575-7; Jones v. Perkins, 5 B. M., 222; Am. Acc. v. Fidler, 18 Ky. Law Rep., 161.)

20. Insured's wife was not a competent witness. (Howard v. Commonwealth, 118 Ky., 1.)

GEORGE WEISSINGER SMITH and O'NEAL & O'NEAL, for appellee.

CLASSIFICATION OF AUTHORITIES.

1. The appellant was not entitled to a peremptory instruction nor was the verdict flagrantly against the evidence. (Holloman v. The Life Ins. Co., 1 Woosa, (U. S.) 674; Joyce on Insurance, sec. 412; Hogle v. Guardian Life Ins. Co., 6 Robertson (N. Y.) 567; 19 A. & E. Ency. of Law, 108d; Provident Savings Life Assurance Society v. Whayne's Adm'r, 29 Ky. Law Rep., 160 (93 S. W., 1049), distinguished.

2. Appellant cannot complain of the instructions given, because it did not ask for instructions like those in the Whayne case, and those given by the court substantially embodied those actually offered. (Arnold v. Garth, 10 Ky. Law Rep., 320; L. & N. R. R. Co. v. Bullins, 15 Ky. Law Rep., 752; Clarke v. Stockdon, 4 Litt., 217; Commonwealth v. Gill, 14 B. M., 18, 19; Louisville, New Albany & Chicago R. R. v. Davidson, 12 Ky. Law Rep., 142; Thomas v. Stickler, 93 S. W. (Ky.) 648.

3. The appellant did not rely upon assured's statements; hence it can not complain of his answers, if they were false. (Bispham's Eq. secs. 207, 214, 215, 216, 217; 14 A. & E. Ency. of Law, 111 (3); Ky. Stats., sec. 639.)

Digitized by Google

4. Right of wife to testify. (Civil Code, sec. 606; Commonwealth v. Sapp, 90 Ky. 580.)

5. Ground of objections must be stated. (Ency. of Pl. and Pr., vol. 8, p. 163.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On November 16, 1903, Louis C. De Lang applied to the Illinois Life Insurance Company for a policy of insurance on his life in the sum of $2,000, payable to his father, Felix V. De Lang. The application was accepted, and the policy issued on November 28, 1903, the first premium being then paid. The insured died on October 22, 1904, and, the company having declined to pay the amount of the policy, this action was instituted by Felix V. De Lang to recover on it. The company defended upon the ground that certain statements of the insured in his application were untrue, and that it was thereby induced to issue the policy, when, if the truth had been stated, the application would have been rejected. The case was tried before a jury, who found for the plaintiff, and, judgment having been entered upon the verdict, the insurance company appeals.

So much of the application as is relied on to defeat a recovery on the policy is as follows: "(16) Except as mentioned above, have you or any of your grandparents, uncles, aunts, parents, brothers or sisters ever had consumption or tuberculosis in any form? Ans. No. * * * (22) Has change of residence, occupation or climate ever been sought or advised for the benefit of your health? Ans. No. * * * (25) Has there been more than five pounds variation in your weight the last two years? Ans. No. * * * (29) Have you ever used spirituous or malt liquors freely or to excess? Ans. No. (30) What is your

Digitized by Google

practice, as regards the use of spirituous or malt liquors? State amount consumed daily? Ans. I do not exceed two glasses drinks of spirituous liquors any day, beer daily. I do not exceed nine drinks of wine or malt liquors any day. I do not average more than three drinks alcoholic liquors daily, whisky. * * * (32) Are you usually in good health? Ans. Yes. (33) Are you now in good health? Ans. Yes. (34) Have you ever had spitting of blood, habitual cough, or expectoration or shortness of breath? Ans. No. * * * (65) Have you ever had an obstinate cough? Ans. No. * * * (93) What ailments, diseases or accidents have you had since childhood not previously herein fully explained, including any of the above answered yes? Ans. Name of diseases, measles and mumps. Approximate dates, when a child. Name of disease, typhoid fever. Number of attacks, one. Approximate dates, 1883. Duration, two months. Was recovery complete? Yes. Full name of physician consulted, Dr. Walling, deceased, city. Two years ago had one attack of external piles. I only used an ointment procured from drug store. I have had no recurrence of piles since. (93 1-2) Full name of physician last consulted by you? Ans. Dr. Walling, typhoid, 1883. (94) Have you at the present time, or have you ever had, any disorder, sickness, disease, weakness or disability of any kind not herein mentioned and fully explained? Ans. None.

The defendant introduced proof showing that in the year 1902 the insured lived in Chicago, and toward the latter part of the year was in very bad health; that he lost weight, had an habitual cough, shortness of breath and night sweats; that he could not walk erect, was very haggard looking; that his feet were swollen; that he said that he had consumption, and that he could not walk upstairs to deliver

Digitized by Google

goods. It also proved by Dr. Pickard that on December 23, 1902, the insured consulted him professionally, stating that he was short of breath; that he was weak; that his appetite was poor; that he had been losing flesh, and that it was difficult for him to walk upstairs. The physician also stated that he then examined him, after having him take off his shirts; that his chest did not dilate and contract as a healthy person; and that, by sounding on the chest and by use of the stethoscope, he concluded that the patient had consumption. His statement as to what he told the patient is in these words: "I told him that he was a man that looked death in the face; that it was coming to us all, and would soon come to him; that he had consumption, and I thought he was the one to know it; that he had, I thought, a fighting chance, but if he lived it would be because he fought well and under good management, but that his chances were very poor. * * * He spoke about a change of climate, and seemed quite anxious. He was predisposed to the idea of a change of climate. He said that his circumstances were not such that he could be properly housed and cared for in Chicago climate, and he would like to go south, and, perhaps, probably, to New Mexico. He asked me what I thought about New Mexico. I told him a great many physicians advised Albuquerque. He told me that, if he could get an appointment as a local preacher or temperance lecturer, in that way he could get transportation cheaper, and he would go to the southwest for his health." He also testified that he subsequently treated him for the next six weeks, and that he left Chicago about the first of February, and came to Louisville. He did not stay long in Louisville, but went with his wife and child to Albuquerque, N. M. The defendant showed that he was examined by a

Digitized by Google

physician in Albuquerque when he reached there, who also testified substantially as the Chicago physician as to his condition then. The defendant introduced several other witnesses in New Mexico who saw him soon after he arrived there, and testified, in substance, to the same facts as the Chicago witnesses as to his condition. In the fall of the year he returned to Louisville, apparently in good health, and soon after his return took out the policy of insurance referred to. He died about 11 months later of consumption. The plaintiff did not introduce any evidence to contradict the witnesses in Chicago and New Mexico, except himself and the wife of the deceased, who said, in substance, that her husband's health was always good. The plaintiff also introduced several other witnesses in Louisville who saw him there, and observed nothing wrong with his health. When the application was made he was examined by the physician of the insurance company, who found nothing wrong with him, and reported him in normal condition, approving the risk. The physician testifies that his inspiration was then good, and that he made only such an examination as he could make without the use of instruments, relying on his statement that his health had been good. The plaintiff proved that the deceased died of acute miliary consumption, or what is called "galloping consumption," and that this disease is usually fatal in three or four months, rarely running over six.

The court set out in an instruction in part the questions and answers above quoted from the application, and then said as follows: "The law of the case is for the plaintiff, and you should find for the plaintiff the sum of $2,000 with interest thereon at the rate of 6 per cent per annum from the 12th day of December, 1904, unless you believe from the evidence that the

Digitized by Google

answers given to said questions, or some of them, were, without the knowledge of the defendant insurance company, untrue in some particular, in which true answers would have stated facts or conditions which were reasonably and ordinarily calculated to shorten the life or increase the probability of the death of Louis Constant De Lang, or which, if known to the defendant, Illinois Life Insurance Company, it, acting naturally and reasonably, would not have entered into the policy contract upon the terms and at the annual stipulated premium as shown in the policy sued on, in which latter event the law is for the defendant, and you should so find. (2) If you believe from the evidence that Louis C. De Lang had had tuberculosis of the lungs before the 16th of November, 1903, you will find for the defendant, but, unless you believe from the evidence that Louis C. De Lang had had tuberculosis of the lungs before the date of said application, or unless you believe from the evidence that the answers to the questions above set out, or some of them, were untrue, as submitted in instruction No. 1, the law is for the plaintiff, and you should so find." These instructions are subject to the same objection as those condemned in the case of Provident Assurance Society v. Whayne's Admr., 93 S. W. 1049, 29 Ky. Law Rep. 160. The jury is not to judge whether, if the truth had been stated, facts or conditions would have been disclosed which were reasonably and ordinarily calculated to shorten the life or increase the probability of the death of the insured, nor is it to determine whether, if these matters had been disclosed, the insurance company, acting reasonably and naturally, would have issued the policy. The jury is not to determine by their standards what the insurance company would reasonably have done. In the case referred to we said: "The question was not

Digitized by Google

what ought the insurance company to have done, had it known the truth concerning the facts misrepresented, but what it probably would have done. That was to be determined not by what it might say afterwards about it—for manifestly that would be a very unsafe standard—but by what was the usual course of those engaged in such business under similar circumstances. The jury must determine the matter, not from their own standards, but from the practice of those engaged in that business. They should put themselves in the place, as it were, of the insurer as of the time the application came to be acted upon, and assuming that all the facts were then known, to determine the probable course of the insurance company by the course generally pursued by those whose habit and business experience generally impelled them to a particular action under such circumstances." The case does not turn on the question merely whether the insured died of a disease which he had at the time he made the application. What he died from is only material so far as it may illustrate the truthfulness of the answers made in the application. The question to be determined is whether the risk which it was about to assume was fairly represented to the company in the application by the insured. The case seems to have been tried in the circuit court, and is largely argued in this court, as though it depended upon the question whether the insured in fact had consumption when he made the application, and whether the doctor who examined him in Chicago, and the doctor who examined him in New Mexico, were mistaken as to what was the matter with him. But, though these matters were both found for the plaintiff, still other matters relied on by the defendant would remain. The court should have set out in the instruction the questions and answers quoted

Digitized by Google

above, and should then have told the jury that, if these answers, or any of them, were substantially untrue, and if, according to the usual course of the insurance business, the application would not have been accepted and the policy issued if the truth had been stated in the application, they should find for the defendant; and that otherwise they should find for the plaintiff the amount of the policy. In another instruction the court should tell the jury that the question they are to try is not whether the physicians, if any, whom the insured had consulted, were mistaken as to what was the matter with him, or whether the insured at the time of his application in good faith believed he was free from disease, but that the question is whether the answers above set out were substantially true, and if they, or any of them, were untrue, whether, according to the usual course of the business of insurance, the policy would have been issued if the truth had been stated in the application. These are all the instructions which need be given.

In view of all the evidence in the case, the court did not err in refusing to instruct the jury peremptorily to find for the defendant. The rule is that, if there is any evidence, the question is for the jury, and under this rule the peremptory instruction should not have been given.

The insured's wife was a competent witness for the plaintiff. She did not testify as to any communications between her and her husband. She may testify as any other witness as to the health of her husband, or as to what he did, or as to any other matters not involving communications between her and her husband growing out of the marital relation. We see no objection to the testimony which she gave in the case to the effect that her husband did not have this or that symptom at a certain time. No witness,

Digitized by Google

not an expert, should be allowed to state his opinion that the insured had consumption or did not have it, or that he was in good health or bad health. The non-expert witnesses may detail the facts that they know. They may tell what symptoms they saw or observed, but the jury can judge as intelligently as the witnesses as to what the symptoms indicated. On the return of the case to the circuit court the defendant may have leave to retake any of its depositions it wishes, so as to conform the testimony to the rule we have laid down.

Judgment reversed, and cause remanded for a new trial.

CASE 74.—PROCEEDING BY THE COMMONWEALTH BY GEO. H. ALEXANDER, REVENUE AGENT, AGAINST MITCHELL, CASSELL & BAKER TO RECOVER TAXES ON OMITTED PROPERTY.—February 8.

Commonwealth, by Alexander, Revenue Agt. v. Mitchell, Cassell & Baker

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

From a judgment of the circuit court dismissing an appeal from the county court plaintiff appeals. Reversed.

Taxation—Omitted Property—Action in County Court—Appeal to Circuit Court.—On an appeal from a judgment of a county court to the circuit court in a proceeding therein by a revenue agent against a defendant for a failure to list omitted property for taxation in which the county court adjudged that

Digitized by Google

"the proceeding be dismissed," the circuit court should proceed to try the case anew, and upon the evidence determine whether or not the property is liable to assessment, and if the court concludes it is liable, it should remand the case to the county court with directions to enter judgment assessing the omitted property which the circuit court may adjudge to be liable, and for what years, leaving to the county court the fixing of the fair cash value thereof.

J. A. EDGE, attorney for appellant.

POINTS OF LAW.

1. Right of appeal. An appeal lies to the circuit court from the judgment of a county court in a proceeding by a revenue agent for the state-at-large for assessment of omitted property. (Kentucky Statutes, section 4241; Carroll's Code, section 24; Bullitt's Code, section 724, and sub-section 1, of that section, being Act of May 9, 1884; Commonwealth v. Reed, 28 Ky. Law Rep., 382; Commonwealth v. Morehead, 25 Ky. Law Rep., 1927.)

2. How taken. The Commonwealth is entitled to a trial de novo in the circuit court on an appeal from the judgment of the county court. (Kentucky Statutes, section 4241; Code of Practice, section 726; Commonwealth v. Reed, 28 Ky. Law Rep., 382.)

3. Form of judgment. A judgment of the county court should show expressly that it decided that the property was liable for assessment and taxation or that it was not liable for assessment and taxation.

J. D. & G. R. HUNT, attorney for appellant.

SUMMARY.

No appeal lies from a judgment of the county court to the circuit court in a proceeding under section 4241, Ky. Statutes, to assess property as omitted from taxation, unless the county court decides that such property is or is not liable to assessment. (Kentucky Statutes, section 4241; Commonwealth v. Morehead, 25 Ky. Law Rep., 1927, 78 S. W., 1105; Commonwealth v. Reed, 28 Ky. Law Rep., 382, 89 S. W., 294.)

Digitized by Google

OPINION OF THE COURT BY JUDGE SETTLE—Reversing.

The appellant, Commonwealth of Kentucky, by George H. Alexander, revenue agent for the State at large, filed in the Fayette county court a "statement and petition" charging that appellees, Thomas D. Mitchell, William H. Cassell, and Frank T. Baker, partners doing business in the city of Lexington under the firm name of Mitchell, Cassell & Baker, had failed to list for taxation, either State or county, for the year 1900, 1901, 1902, 1903, and 1904, personal property, consisting of merchandise, bonds, notes, cash on hand and on deposit, choses in action, etc., of which they were the owners and in possession of as of the 15th of September of the years 1900, 1901, 1902, 1903, and the 1st of September, 1904. After setting forth in the customary form the rate of taxation, State and county, for each of the years indicated, and such further facts as are required by section 4241, Ky. Stat., 1903, under which the proceeding was instituted, the statement closed with a prayer for the assessment of the omitted property by the court for the years in question, and judgment against appellees for the tax so assessed, with the statutory penalty. Appellees filed answer, denying that they had omitted to list for taxation in or for the years charged any property belonging to them. The answer was controverted by reply. On the hearing the county court dismissed the proceeding. That part of the judgment complained of is as follows: "This cause having been heard by the court, and the court being fully advised, it is ordered and adjudged that the proceeding be, and the same is hereby, dismissed, to which the plaintiff excepts." An appeal from this judgment

Digitized by Google

was taken to the circuit court. When the case reached that court, appellee moved to dismiss the appeal upon the grounds that the judgment of the county court was final, and that the circuit court had no jurisdiction of the appeal. The motion to dismiss the appeal was sustained by the circuit court; the judgment entered in that court being as follows: "This cause having been heard upon the motion of appellees to dismiss the appeal herein, and the court being advised, it is now ordered and adjudged that the appeal taken in the above-styled action from the judgment of the Fayette county court be, and the same is hereby, dismissed. To this judgment appellant objects and excepts, and prays an appeal to the court of appeals, which is granted."

The question presented for our consideration by the appeal to this court is mainly one of practice. Section 4241, under which the proceeding was instituted, provides: "If it shall appear to the court that the property is liable for taxation and has not been assessed, the court shall enter an order fixing the value estimated as required by law; if not liable, he shall make an order to that effect. From so much of the order deciding whether or not the property is liable to assessment either party may appeal, as in other civil cases. * * *" In Commonwealth v. Morehead, 78 S. W. 1105, 25 Ky. Law Rep. 1927, it was held that the circuit court did not err in dismissing an appeal taken to that court from the judgment of the county court, whereby a proceeding against the taxpayer to require him to list for taxation property omitted from assessment in previous years had been dismissed. This ruling was based upon the grounds that as the judgment of the county court did not in terms decide whether the defendant was or was not the owner of personal property which he had omitted

Digitized by Google

to list for taxation for the years named, and the record contained no transcript of the evidence heard by the county court upon the trial, the inference should be indulged that the county court found that the defendant did not omit to assess any of his property in the years named.

The soundness of this conclusion would be manifest if the case had to be determined by the circuit court upon the same evidence heard by the county court; otherwise, it is untenable. From the language of the opinion it is evident that the court had in mind the view that the appeal in the circuit court had to be tried upon a bill of exceptions containing the evidence introduced on the hearing in the county court, and, as there was no bill of evidence in the record, the recitals of the judgment furnished the only information to be obtained from the record of what was decided by the county court. It was not, however, expressly decided in that case that the appeal should have gone to the circuit court upon a bill of exceptions. In the more recent case of Commonwealth, for Use, etc., v. Reed, 121 Ky. 432, 89 S. W. 294, 28 Ky. Law Rep. 381, it was held that an appeal in a proceeding like this is regulated by sections 724-731 of the Civil Code. This is necessarily so, for by section 700 of the Code its provisions are made applicable to county courts, and by section 726 it is provided: "Appeals shall be docketed and stand for trial as an ordinary action, and shall be tried anew as if no judgment had been rendered." Section 4241 of the statute, supra, provides that an appeal as therein allowed may be taken "as in other civil cases." Obviously, the appeal is governed by the provisions of the Code, except that the bond required by section 726 of the party appealing need not be given, for the statute (section 4241) provides; "* * * No ap-

Digitized by Google

peal bond shall be required where the court decides that the property is not liable to assessment or taxation."

Not only was the view herein expressed adopted in Commonwealth, for Use, etc. v. Reed, supra, but in the opinion we find this statement in respect to the action of the circuit court in dismissing the appeal from the judgment of the county court: "The circuit court had jurisdiction of the case as the appeal had been regularly taken. The case stood as an ordinary action, and was to be tried in the circuit court de novo, as though no judgment had been rendered in the county court. If the circuit court reaches a different conclusion from the county court, he must remand the case to the county court, with directions to enter the judgment as indicated by him, for the assessment is to be made by the county court, and is to be certified to the auditor, and entered in a book kept for that purpose by the county clerk." If the case is to be tried de novo upon reaching the circuit court, no valid reason can be urged for its refusal to take jurisdiction because the judgment of the county court, appealed from, is silent as to the particular steps taken in that court. It is not material, therefore, that it should state whether the county court did or did not decide that the property sought to be listed for taxation had been omitted by the owner. Such a statement would, however, be necessary if a bill of exceptions containing the evidence were required on the appeal to the circuit court; for, in that event, in the absence of a proper recital in the judgment showing that the county court had passed on the question of whether or not the property had been omitted, there would be no means of ascertaining the fact from the record.

While it is true that only so much of the judgment of the county court as decides whether or not the

Digitized by Google

property is liable to assessment is appealable, as the appeal is tried de novo in the circuit court, if the judgment of the county court merely shows the dismissal of the proceeding in the county court, the circuit court will, on the appeal of the revenue agent, assume that it was dismissed by the county court upon the ground that the property sought to be listed had not been omitted by the person proceeded against as charged. On the other hand, if the appeal is taken by the defendant, and the order shows that the judgment went against him in the county court for any amount, though the omitted property be not specified, or the year or years it was omitted be not named, the circuit court will assume that it was for the assessment and taxation of the property, or some part thereof, alleged to have been omitted. In either event the circuit court should proceed to try anew, upon the evidence introduced by the parties. the question of whether or not the property attempted to be assessed is liable to assessment; and, if a different conclusion from that of the county court be arrived at by the circuit court, it will remand the case to the county court, with directions to enter judgment in that court as indicated. If the judgment of the circuit court should be that property which the county court adjudged had not been omitted is liable to assessment and taxation, it should direct the county court to assess the omitted property, naming the years for which it should be assessed, but leave to the county court the fixing of the fair cash value thereof.

Being of opinion that the circuit court erred in dismissing the appeal, the judgment is reversed, and cause remanded for further proceedings consistent with the opinion.

Digitized by Google

CASE 75.—ACTION BY C. W. SEWELL AGAINST B. M. HAGINS AND OTHERS FOR THE ENFORCEMENT OF A CONTRACT TO BUILD A PARTY WALL BETWEEN THEIR ADJOINING LOTS.—February 8.

Hagins, &c., v. Sewell

Appeal from Breathitt Circuit Court.

ROBERT RIDDELL, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Specific Performance—Damages.—Where a contract for the sale of a lot required the vendee to construct a building within 18 months and erect a party wall on the east side, adjoining the vendor's remaining vacant property, and in a suit to enforce performance of such stipulation plaintiff neither alleged nor proved that he had lost the sale of his adjoining lot through defendant's failure to erect the wall, nor that plaintiff intended himself to erect a building on the lot, he was not entitled to recover damages for defendant's failure to erect the wall within the time prescribed.
2. Same.—Where a deed to a vacant lot contained a covenant obligating the vendee to erect a building on the land conveyed, together with a party wall adjoining the vendor's remaining premises, and the vendee failed to erect the wall within the time prescribed. the vendor suing for specific performance, was entitled to a judgment for the cost of the wall in case the vendee should fail to perform within the time allowed by the court.
3. Same—Judgment—Operation and Effect.—Where, in a suit to compel performance of a covenant to construct a building and a party wall on a lot conveyed, complainant recovered a judgment for the cost of the wall in case defendant should fail to erect it within the time limited by the court, complainant, if he collected the judgment and failed to erect the wall and the same should afterwards be erected by defendant, would not be entitled to use the wall without paying for the privil-

Digitized by Google

ege, while if complainant erected the wall after collecting the judgment, defendant or his vendee would be permitted to use it without making further contribution.

KELLY KASH & J. J. C. BACH, attorneys for appellants.

Our chief objection to the judgment of the court is the decision awarding damages without trial by jury, and awarding and adjudging a lien against property for unliquidated damages without some express understanding between the parties to that effect.

We insist further that the judgment is erroneous in adjudging that defendant should construct the building in question on or before October 1, 1905, the judgment being entered in May of the same year, the time being inadequate and insufficient in which to construct such building.

That the judgment is erroneous in sustaining plaintiff's motion to strike from defendant's answer the plea of the Statute of Limitations as a bar to plaintiff's right to a specific performance of the contract.

We insist that plaintiff's claim of damages is unwarranted and unfounded, light, weak and feathery and is founded neither upon wrongs or torts committed by these appellants nor damages or loss sustained by appellee; and that the claim of lien is infinitely more long-drawn and far-fetched and is supported neither by contract of parties either express or implied, nor by equity or operation of law.

For these reasons we insist that the judgment of the lower court awarding damages against appellants and a lien against their property should be reversed.

W. W. McGUIRE and O. H. POLLARD for appellees.

By the contract appellants received conveyance to a valuable lot, for which they agreed to pay $1,500, and to erect a building with a wall on the dividing line of the appellees lot for the joint use of both parties.

Appellee parted with the title and delivered possession to appellants on the faith of the undertaking. The consideration has not been paid.

Can appellants take appellees property under a solemn contract requiring him to perform certain acts as part of the consideration and then refuse performance?

The learned chancellor took a very different view of it and adjudged that appellee was damaged in the sum of $600 and we submit that this judgment should be affirmed with a lien on the property to secure its payment it being a settled rule in this State

Digitized by Google

that, as between the parties the grantor has a lien for the unsatisfied part of the consideration even though the deed recites that the same has been paid in full. (Ross v. Adams, 13 Bush, 370; Brown v. Ferrell, 83 Ky., 417.)

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

On the 5th day of March, 1895, the appellee sold and conveyed to the appellants a lot in the town of Jackson, Ky., for $1,500, $1,266.80 cash in hand paid, and lien was retained for the remaining $233.20, due in four months. The deed contained this further stipulation, to-wit: "In addition to the money consideration aforesaid, the said parties of the second part agree to build within 18 months, upon the lot hereinafter described, a two-story brick building, the stories to be 22 feet high, and the wall above the square to be of proper height in front and rear; the said building to be 60 feet in length, and the wall and cellar wall on the eastern side to be fireproof, and to be so constructed that the party of the first part or his successors can join to it another building of the same height and length, and any conveyance by them shall require their vendee to do likewise." The money consideration has all been paid; but the appellants have failed to erect this house as stipulated in the deed. The lot sold to appellants is situated on the corner of Main and Jail streets. The appellee owns, and did at the time of the conveyance, the lot east of and adjoining this lot; and the object of requiring a fireproof wall was for the purpose of allowing him, or any vendee of the lot, to use this fireproof wall as a wall of a building that he might erect upon the vacant lot. In September, 1902, appellee instituted this action against appellants, by which he sought to compel them to perform the contract in the erection of the building and to recover damages for the loss

Digitized by Google

sustained from the time they should have built it under the contract to the time of filing the suit. The appellants answered, making an issue as to the damages claimed, and alleging that they were willing, and had been willing all the time, to comply with their contract if appellee had demanded it, which he had failed to do, and pleaded the statute of five years' limitation against appellee's claim.

The court tried the case and entered the following judgment, viz.: "The plaintiff moves to submit this case for judgment on the merits. Defendants moved the court to grant them an issue out of chancery to try the question of damages, and by agreement the case was submitted on each of the said motions; and the court, being sufficiently advised upon the pleadings, proof, and exhibits, is of the opinion, and now adjudges, that the defendants purchased from the plaintiff the lot of land described as follows." Then, describing the lot, it proceeds: "The court is further of the opinion that the defendants have failed to pay any part of the said consideration, except to pay the $1,500. And the court now adjudges that the plaintiff has been, at all times since the 5th day of March, 1895, entitled to a specific performance of said contract and obligation, and that the plaintiff has an enforceable vendor's lien upon the lot of land herein described for the purpose of enforcing said contract. The court is further of the opinion, and now adjudges, that the defendants construct said building as herein mentioned, and time is given them until the 1st day of October, 1905, to complete same. Should they fail to do so, the court is of the opinion, and so adjudges, that the plaintiff recover of the defendants the value of the building as contracted for to him, which is $600. So much of the defendants' motion for an issue out of chancery to try the question of damages result-

Digitized by Google

ing to plaintiff by reason of defendants' failure to construct said building within 18 months from the 5th day of March, 1895, to the filing of the plaintiff's petition, as is independent of the value of said building, which is fixed at $600, is granted, and said issue is awarded them."

It is conceded by the parties that the court fixed $600 as the costs of the fireproof wall which appellants agreed to erect between theirs and appellee's lots. Appellee testified that it would cost that sum to erect it, and introduced a witness, who was a contractor and builder, who testified that it would cost $800; and appellants testified that they had obtained estimates, from skilled men in contracting and building, showing that it would cost less than that sum. The appellee also testified that the use of such a wall to his lot was worth $100 per annum, and, if it had been built, would have largely enhanced the value of his lot. The appellee did not allege or prove that he had lost a sale of his lot by reason of appellants' failure to erect this wall, nor did he allege or prove that he had intended himself to erect a building on his lot; and we are at a loss to understand how the use of this fire wall would have been of the value of $100 per annum, unless he had a building on his lot. We can understand how the erection of the wall with the privilege of joining his building would have enhanced the value of his lot. If appellee is permitted to recover the cost of building this wall, his loss occasioned by the failure of appellants to construct the wall will be adjusted. We are of the opinion that the court did not err in allowing appellee to recover the cost of erecting the wall; and, should he collect this judgment and fail to erect the wall, and the appellants, or their vendees, should afterwards erect it, as stipulated in the deed, appellee, nor his vendees,

Digitized by Google

should be allowed to join thereto without paying for the privilege. If appellee collects the judgment, and he or his vendee construct the wall, then appellants or their vendee should be permitted to join their building to it.

The appellants' plea of limitation cannot avail them, for the reason that the contract was in writing. Accepting the deed, with the consideration named therein, the statute of 15 years applies.

The appellants also contend that the lower court had not the power to enforce specific performance and require the appellants to erect the building. As we understand the judgment, the court did not do this. It only fixed the time in which the appellants might perform the contract, so as to save themselves from being compelled to pay the $600 judgment. It was optional with them to perform the contract or pay that amount of money.

The appellants further complain of the action of the court in adjudging a lien upon the lot sold appellants for the payment of the $600. It is true that it was not stipulated in the deed that a lien was retained for the damage sustained by appellee on account of the failure of appellants to perform their obligation; but it was stated in the deed what part of the consideration remained unpaid, which meets the requirements of section 2358 of the Kentucky Statutes of 1903. A lien exists as to the vendee, although it does not appear from the deed that the purchase money remains unpaid; but in such cases the lien would not exist as against bona fide creditors and purchasers.

In our opinion the judgment of the lower court was an equitable settlement of the matters in litigation between the parties, except the transfer to the ordinary docket for the trial of the issue on the question

Digitized by Google

of damages. As stated, there was no such issue formed by the pleadings..

For the reasons stated, the judgment of the lower court is affirmed.

Petition for rehearing by appellant overruled.

CASE 76.—ACTION BY W. S. ROBERTS AND OTHERS AGAINST THE TOWN OF CLAY CITY TO COMPEL IT TO BUILD A BRIDGE ACROSS A RIVER RUNNING THROUGH THE TOWN.—February 13.

124 594
j127 133

Clay City v. Roberts, &c.

Appeal from Powell Circuit Court.

J. M. BENTON, Circuit Judge.

Judgment for plaintiffs. Defendant appeals. Reversed.

1. Bridges—Erection.—Where a town is authorized to build a bridge across a stream it is its duty to build a more permanent and substantial structure than a pontoon bridge.
2. Same—Refusal to Build Bridge—Lack of Funds.—The refusal of a town, because of a lack of available funds, to rebuild a bridge which has been washed away, will be sustained though a portion of the inhabitants are greatly inconvenienced thereby.
3. Mandamus—Discretion of Council—Formality of Determination.—The council being the legislative branch of a town government as long as it acts within statutory authority in the management of the town affairs, its acts are not subject to judicial control, and the action of a town council in refusing to rebuild a bridge which had been washed away was not subject to review by mandamus.

Digitized by Google

JOHN D. ATKINSON, attorney for appellants.

We submit:

1. The relief granted is insufficient. If the plaintiffs were entitled to a bridge it should have been adjudged to be a substantial structure that would have been safe for the public to use.

2. The judgment is too indefinite and uncertain. There is no description of the structure directed to be built and no dimensions given, or of materials to be used in its construction. No mechanic could construct a bridge under this judgment.

C. F. SPENCER and PENDLETON & BUSH, attorneys for appellee.

POINTS AND AUTHORITIES CITED.

1. Authority and power of the city to re-construct the bridge. (Kentucky Statutes, sec. 3643.)

2. Mandamus is the proper remedy. (Trustees, &c. v. Kinner, &c., 13 Bush, 334; Hammar v. City of Covington, 3 Metcalfe, 449; Kentucky Statutes, sec. 4330.)

3. It was the duty of the city council to re-construct the bridge across Red River. (Riley v. Buchannan, 76 S. W. Rep., 527; City of Louisville v. Snow's Administrator, 54 S. W. Rep., 862.)

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

Clay City is a town of the fifth class, and Red river runs through the town. Some years ago a lumber company operated a planing mill on one side of the river and a sawmill on the other side, and for its convenience in carrying on its business this lumber company built a pontoon bridge across the river. The bridge was used by the lumber company and also by the citizens of the town in general. While the lumber company was in operation, it kept the bridge in repair. Some years ago the lumber company moved away from Clay City, and since that time such repairs as the bridge had were made by the town. Shortly before the institution of this suit the bridge washed

Digitized by Google

away. Some 12 or 14 families, the proof shows, reside on the north side of the river, but the principal part of the town is on the south side. After the bridge washed away and was destroyed, those citizens living on the north side of the river had no means of reaching the south side save by boat, and were thus cut off from the public buildings, churches, schoolhouses, etc., of the town on the south side. They requested the authorities of the town to replace the bridge, and, they having refused to do so, instituted their suit in the Powell circuit court seeking to compel the town to replace the bridge. The circuit judge, of his own motion, directed that Powell county be made a party defendant. This was done by an amended petition. A demurrer having been filed by Powell county to the petition as amended was sustained, and the petition dismissed as to Powell county, and the suit proceeded against the defendant Clay City alone. The total income of the town was about $1,500 a year, and $1,000 of this was raised from saloon licenses, and at the date of the trial in the circuit court there was a deficit in the town treasury of something like $300. The trial judge directed the trustees of the town to cause a bridge, or other contrivance, to be built across the river, at or near the point where the pontoon bridge crossed the river, the structure to be substantially as safe and convenient as the pontoon bridge was when it was in reasonably good repair. From this order and judgment, the town appeals.

Appellees insist that by section 3643, Ky. Stat., 1903, the town council is empowered to reconstruct this bridge, and upon a showing that it was a public necessity it was their duty to do so, and that the fact that the town had kept the bridge in repair after the lumber company had moved away from the town

Digitized by Google

was an evidence that the town had accepted the bridge and made it a part of its public highways. It is true that the town had, after the lumber company had ceased to be operated, and had abandoned the bridge in question, kept its approaches in repair, and perhaps made some repairs to the bridge itself. But the proof on this point is not sufficient to warrant the conclusion that the town had accepted this bridge as a part of its thoroughfares. There is no proof showing the width of Red river at the point where it was crossed by this bridge, nor is there anything in the record in this case to give even an idea of what the cost of bridging the river, even with a pontoon bridge, would be. It has been held in the case of Leslie County v. Wooten, etc., 115 Ky. 850, 75 S. W. 208, 25 Ky. Law Rep. 217, that where a bridge which had washed away formed a part of a county road, it was the duty of the fiscal court to rebuild it, under section 1840, Ky. Stat., 1903, and that upon their refusal to do so, a mandamus would lie to compel them to rebuild it, it being shown that the bridge was over a stream on a much-traveled road. And in the case of Trustees of Elizabethtown v. Hardin County, a manuscript opinion filed in February, 1877, this court said: "Regarding the county court as controlling the road like any other public highway in the county, it is still certain, from the admitted facts, that this bridge is indispensable for public use, or at least made necessary by the wants of the public. It is on the principal thoroughfare traveled by one portion of the inhabitants of the county in going to, and returning from, the county seat and the railroad depot. It is a bridge constructed on a highway 70 feet long, and essentially a county bridge. The county court is required by statute to erect such structures on its public ways when required for public use." And the court

Digitized by Google

directed this bridge to be rebuilt by the county. In the case of Commonwealth v. Boone County, 82 Ky. 632, 6 Ky. Law Rep. 755, a mandamus was sought to compel the county court of claims to build a new bridge over a stream crossed by one of the public roads of the county. The court met and decided that the bridge was not necessary, and upon appeal to this court it was held that the question as to whether or not the bridge should be built was one that was properly left to the discretion of the county court, and that its discretion could not be controlled by mandamus. Thus it will be seen that the two cases in which the mandamus was held to lie were those in which bridges were destroyed, and it was made plain from the evidence in the case that they were public necessities, and, being such, it was the duty of the fiscal court having charge of the public roads and thoroughfares of the county to replace them. But, in the Boone county case, where an effort was made to compel the fiscal court to build a new bridge, it was held that it was within the discretion of the fiscal court to say and determine whether or not the building of the bridge was a necessity. We have been unable to find any case in which a city or town was required by mandamus to bridge a stream running through it. There is a special statute governing the replacing of county bridges which have been lost or destroyed, but this statute is not applicable to cities and towns, nor does it refer to or treat of bridges within the corporate limits of a town which have been destroyed. We doubt very much if a pontoon bridge would come within the meaning of the word "bridge" as used in the statutes. Evidently the lawmakers had in mind a stable, and, to a reasonable degree, a durable, structure, when they used the word "bridge." A pontoon bridge, built upon no founda-

Digitized by Google

tion, but merely floating upon the surface of the water, and liable to be washed away by any sudden rise in the river, is neither substantial in its structure nor enduring in its nature. And while such a structure had been maintained for a number of years across the river in Clay City at the point named, it is not at all certain that, even if the town was shown to be able to replace it, and desired to do so, it would not be washed away or destroyed by the first flood in the river.

In the case before us, we are of the opinion that, if the town council should build a bridge across Red river, they would not be warranted in building a bridge known as a "pontoon bridge," one which might be swept away or destroyed at any time by a ffood in the river, but it would be their duty to construct a bridge of more permanent and substantial nature. This being true, we are confronted with the question as to whether or not the finances of the town are such as would permit them to build a bridge across Red river of the character indicated, or, in fact, to build a bridge at all. Under section 3637, Ky. Stat., 1903, the council of a town of the fifth class has general power and authority to pass such ordinances or laws, not in conflict with the Constitution and general laws of the State or of the United States, as may be necessary to the proper conduct of the town's affairs, and included in this general power is the power to lay out and improve its streets and thoroughfares. It is left for the council to say, not only what streets shall be improved, but how they shall be improved. It is presumed that, being elected by the citizens of the town, and selected from among them, they will act for the best interests of the town. But, while the council is given the right to determine what streets shall be improved, and how it shall be done,

Digitized by Google

they are not left to arbitrarily spend the public money, but their acts in making expenditures for improvements are wisely hedged about by statutory provisions, and they may not make an indebtedness in excess of the available money in the treasury that may be legally applied to the purpose for which it is sought to be used. Section 3641, Ky. Stat., 1903, is as follows: "The city council shall not create, audit, allow or permit to accrue, any debt or liability in excess of the available money in the treasury that may be legally apportioned and appropriated for such purposes: Provided, that any city, during the first year of its existence under this chapter, may incur such indebtedness or liability as may be necessary, not exceeding in all the income and revenue provided for it in such year; nor shall any warrant be drawn or evidence of indebtedness be issued, unless there be at the time sufficient money in the treasury legally applicable to the payment of same, except as hereinafter provided." This section provides that in the event the council should deem it necessary that an indebtedness should be incurred that would exceed the levy authorized by law, then they cannot contract for or make such indebtedness, except by a vote of the citizens of the town, as provided for in section 3637, Ky. Stat., 1903, Hence, it would seem manifest that the town council, before undertaking any public improvement for the town, must decide that the desired improvement can be made out of the funds on hand in the public treasury available for that purpose, and, in the case at bar, the refusal of the council to build a bridge across Red river upon the request of the citizens of Clay City living north of the river may have been because of the fact that the proof showed there was no fund whatever in the public treasury available for that or any other purpose, and their

Digitized by Google

refusal to build the bridge in question would certainly be upheld upon this ground, for the council must be governed in their decision not alone by the needs and requirements of the citizens, but also, and to a large extent, by the ability of the town to meet the cost of the proposed improvement. The record before us shows that the total annual receipts of the town are about $1,500, and that $1,000 of this sum is derived from liquor licenses—a source of revenue that may be cut off at any time by the will of the people, and lost to the town. Out of this $1,500 the annual expenses of the town must be met. It may not all be applied to the discharge of a debt for any particular purpose. The town must be lighted, policed, and the other expenses incident to the maintenance of its government must be looked after. With this little revenue at its command, it is manifest that no extensive improvements could be undertaken by the council. The proof further shows that at the date of the trial of this case there was a deficit in the treasury of about $300. If, therefore, in the judgment of the council, any extensive improvement should be desired, it could only be undertaken by first obtaining the right to do so from the citizens of the town, by vote as directed in section 3637, Ky. Stat., 1903.

The council constitutes the legislative branch of the town government, and as long as it acts within the statutory authority given to it in the management of the town's affairs, its acts are not subject to judicial investigation or control. It cannot be required to act in any particular manner upon any subject with which it has a right to deal, and the aid of a court can be invoked only when it has refused to act at all, or acts arbitrarily, or beyond the scope of its statutory authority. In the case before us, the council has acted, and refused to build the bridge—whether

Digitized by Google

because the necessity therefor did not justify the outlay required to build it, or because of the financial inability of the town to build it, we do not know. The record is silent upon this point. But certain it is that the council has acted, and refused to build the bridge. Their action, in our judgment, is final, and, being clearly within the scope of their authority, is not subject to review.

The judgment is reversed with instructions to dismiss the petition.

CASE 77.—ACTION BY J. R. RICHARDSON AGAINST THE MONARCH OIL, GAS & COAL CO., TO CANCEL A MINERAL LEASE.—February 13.

Monarch Oil, Gas & Coal Co. v. Richardson

Appeal from Wayne Circuit Court.

M. L. JARVIS, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

Mines and Mining—Leases—Forfeiture.—A coal, oil, gas, and mineral lease provided that the lessor was to receive a pro rata share of all the oil and minerals produced and should gas be found, then a certain rental from each well, and the lease further provided that lessee should commence a well on the premises within a year or pay thereafter an annual rental of $16. A well was never commenced, but lessee paid the annual rent which was accepted by the lessor. Held that, notwithstanding the lessor was entitled to forfeit the lease for a failure to develop the premises, yet lessor could not do so until he had first declined to accept the rent and demanded of lessee a development of the premises.

Digitized by Google

JOE BERTRAM, attorney for appellant.

Our contention is that after the lessor of mineral lands accepts the annual rental agreed to be paid therefor by the lessee from year to year, he cannot bring suit to cancel the lease for failure of lessor to develop the mineral rights until there has been a default by the lessee both in drilling and paying rental, or until after he refuses to accept the rental and gives notice that he wants his land drilled, which his lease contract authorized him to do.

HARRISON & HARRISON, attorneys for appellee.

Oil operators as a rule are men of experience in their line of business. Their contracts are drawn with a view of serving their interests. The lack of experience of the former invites deception. Speculation and peculation should be discouraged and those who seek by these means to advance their own interests should learn that the oil industry of the State, now in its infancy, will be protected by the courts and allowed unhampered development.

Our contention is:

1. Contract with the contract involved demands the operation of the leased premises.

2. It follows as a corollary that the lease is not complied with by the payment of rental.

3. The failure of appellant to develop the leased premises gave the appellees the right to avoid the lease at any time, without notice.

AUTHORITIES CITED.

Thornton, secs. 126 to 130; Bryan, sec. 182; Donahue, chap. 13, secs. 1 and 4; Huggins v. Daley, 48 L. R. A., 320; Armitage v. Mt. Sterling Oil & Gas Co., 80 S. W., 177; Berry v. Frisbie, 86 S. W., —.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

On October 10, 1898, appellee entered into a contract with Nelson & Ramsey, who assigned the contract to appellant. The material parts of the contract necessary to a consideration of the question involved in this litigation are as follows: "In con-

Digitized by Google

sideration of the mutual covenants and agreements herein contained, and the further sum of one dollar in hand paid, first party has granted and do hereby grant to second party, the exclusive right for the sole and only purposes of operating for coal, oil, gas, ores and other minerals, that certain tract of land (describing it). * * * Terms of lease twenty years or so long as oil, gas, or any of the above substances are obtained in paying quantities. The party of the second part further covenants with the party of the first part that he will give the party of the first part the full equal pro rata share of one-tenth of all the oil and minerals produced and saved on the above described property, the said one-tenth to be set aside in the pipe line when one is constructed, and should gas be found in paying quantities to justify party of the second part in marketing the same, the consideration in full to the party of the first part, instead of the one-tenth royalty, shall be five dollars per month for the gas from each well so long as it shall be sold therefrom, second party to commence a well on the premises within one year from the date hereof, or pay thereafter an annual rental of sixteen dollars each payable annually. * * * It is further agreed that the party of the second part shall have the right at any time to surrender this lease to the party of the first part and thereby be fully discharged from any and all damages arising from any neglect or nonfulfillment of the foregoing contract." In 1906 appellee instituted this action for the purpose of having the contract canceled upon the ground that appellant had failed and refused to commence a well or explore, operate, or develop the premises leased for the production of any of the products mentioned in the contract, alleging that the leased premises were located in the oil fields of Wayne county, adjacent to

Digitized by Google

lands that had been operated and developed for the production of oil and gas, which had been obtained and marketed in large and remunerative quantities to the great benefit and profit of the lessors thereof under leases and contracts similar in terms, conditions and provisions to the contract here in question; that the contract was executed for the sole purpose and condition that the lessees should explore, operate, and develop the premises for the production of oil and other minerals mentioned, and that the failure of appellant to develop or attempt to develop the premises inflicted great and irreparable injury and damage on appellee, and is depriving him of profits and privileges that he would have received if the land had been developed in accordance with the spirit of the contract. He further averred that the appellant was insolvent, and that there was no other adequate remedy except to cancel the contract. Appellant, in its answer, after traversing the averments of the petition, affirmatively averred that, under the contract, it had the right to commence a well on the premises within one year from the date of the lease, or pay thereafter an annual rental of $16.00; and that, although it had not commenced a well, it had paid the annual rental each year, the last payment being made in October, 1905, the next annual payment not being due until October, 1906, and that appellee had accepted each annual installment of rent. It further averred that it was ready, able, and willing to drill and develop the land when and as soon as appellee made his election to require it so to do; that appellee had not at any time notified it that he would not accept the annual rental, or that he would require it to develop the land. To this answer a demurrer was

Digitized by Google

sustained, and, declining to plead further, appellant has brought the case to this court.

The answer is, in effect, a plea of estoppel, rested on the fact that, under the contract, appellant had the right to either develop the premises or pay the annual rental, and that appellee by his acceptance of the annual rental had waived his right, if any he had, to require it to develop the oil and mineral resources on the land. Controversies like this have seldom arisen in our State, as not until lately has there been much activity in the search or development of oil or gas fields, but in late years the discovery of valuable oil and gas lands has made their development an important and profitable industry. And this contract, like all others, should be so construed as to fairly carry out the intention of the parties at the time it was entered into. It is manifest from the language of the contract, providing that the privilege is granted "for the sole and only purpose of operating for coal, oil, gas, ores, and other minerals," that the main purpose in the minds of the contracting parties and especially the grantor, was that the grantees should explore and develop, or attempt to do so, the resources supposed to be upon the land leased. Especially is thus true when it is considered that in the territory in which the land was located oil and gas had been discovered in paying quantities. It would be an unreasonable and harsh interpretation of this contract to hold that appellant, by the annual payment of a nominal sum, might for 20 years deprive the owner of the land of the profits he might reasonably expect to derive from the contract if it was performed as contemplated by the parties and in the spirit in which it was made. If this construction prevailed, at the expiration of the term the gas and oil originally on the premises might be exhausted by adjacent wells to the greater

Digitized by Google

profit of other landowners, and with corresponding loss to appellee. Oil leases yield nothing to the landowner when not worked, and are an incumbrance on his land, preventing him from selling or leasing it to others, although it costs the lessee nothing except the mere pittance paid as rent. The development of mineral, oil, and gas lands is too expensive for the landowner himself to undertake, and requires skill and capital ordinarily beyond the reach of the owner of the soil. So that, in order that these resources may be developed and profit realized therefrom, it is necessary that the privileges be granted to persons who are engaged in the business of exploring and developing oil, gas, and mineral fields. The fluctuating and uncertain character and value of this class of property renders it necessary for the protection of the lessor that the properties leased should be developed as speedily as possible, and the lessee will not be permitted to hold the land for speculative or other purposes an unreasonable length of time for a mere nominal rent, when a royalty on the product is the chief object for the execution of the lease. Thornton on the Law Relating to Oil and Gas, sections 129-160; Huggins v. Daley, 99 Fed. 606, 40 C. C. A. 12, 48 L. R. A. 320; Twin Lick Oil Co. v. Marbury, 91 U. S. 587, 23 L. Ed. 328; Armitage v. Mt. Sterling Oil & Gas Co., 80 S. W. 177, 25 Ky. Law Rep. 2262; Berry v. Frisbie, 120 Ky. 337, 86 S. W. 558, 27 Ky. Law Rep. 724; Munroe v. Armstrong, 96 Pa. 307; Galey v. Kellerman, 123 Pa. 491, 16 Atl. 474.

It is true, as said by counsel for appellant, that forfeitures are not generally favored by the law, but forfeitures which arise in gas and oil leases by reason of the neglect of the lessee to develop or operate the leased premises are rather favored because of the peculiar character of the product to be produced.

Digitized by Google

Hence it has been found necessary to guard the rights of the landowner as well as public interest by numerous covenants, some of the most stringent kind, to prevent their land from being burdened by unexecuted and profitless leases incompatible with the rights of alienation and the use of the land. Forfeiture for non-development or delay is essential to private and public interest in relation to the use and alienation of property. Perhaps in no other business is prompt performance of contracts so essential to the rights of the parties, or delay by one party likely to prove so injurious to the other. Thornton on the Law Relating to Oil and Gas, section 148; Brown v. Vandergrift, 80 Pa. 142. This contract, however, can be so construed as to effectuate the intention of the parties in a manner that will do justice to the lessor as well as the lessee without arbitrarily cancelling it, as was done by the judgment of the lower court and this result may be accomplished by requiring the lessor to give notice to the lessee that he will not accept the annual rentals and permit his land to remain idle and undeveloped, but will require the lessee to execute the contract according to the intention in the minds of the parties at the time it was made by commencing in good faith its development, and, if the lessee does not, within a year from the notice, in good faith commence a well on the premises, the lessor at the expiration of that time may have the lease forfeited. The lessor in this contract did not at any time exact or demand of the lessee that it commence operating for oil or gas, but accepted the annual rentals paid in full discharge of the obligations of the contract, although at the end of any rental period he might have declined to accept rent and required the lessee to begin operations for oil or gas.

We, therefore, conclude that, under the facts stated

Digitized by Google

in the answer, which are to be accepted as true, the court erred in canceling the lease. The rent paid and accepted unconditionally by the lessor satisfied the demands of the contract up to that date, and the lessee had the right to assume that the lessor was satisfied to receive the annual rentals in lieu of the development of the land.

Wherefore, the judgment is reversed, with directions to proceed in conformity with this opinion.

CASE 78.—ACTION BY WILLIAM M. GASTINEAU AGAINST WALTER ELROD CLAIMING A LIEN ON CERTAIN PROPERTY WHICH DEFENDANT HAD PURCHASED TO SATISFY A DEBT ON WHICH THEY WERE COSURETIES.—February 13.

Elrod v. Gastineau

Appeal from Pulaski Circuit Court.

M. L. JARVIS, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

Principal and Surety—Rights of Surety as to Co-Surety.—One conveyed to appellant and appellee his equity of redemption in land sold under a mortgage, to indemnify them against loss as sureties on his bond as a guardian, and, becoming indebted to his ward, was sued and execution issued against the equity of redemption on a judgment against him for $331. Appellant purchased it at sheriff's sale for $175, which was applied to the ward's claim, appellant and appellee each paying $78 to discharge the balance. Appellant redeemed the property. Held, that the purchase by appellant did not redound to appel-

Digitized by Google

lee's benefit, and no lien attached to the property in his favor for the amount paid by him towards the discharge of the guardian's debt.

JAMES DENTON, attorney for appellant.

This case rests purely upon questions of law.

1. The mortgage taken by appellee inured to the benefit of both appellee and appellant, and appellee cannot enforce the same, as against appellant after each has paid an equal amount of the judgment.

2. The acts done by appellant in relation to securing the equity of redemption and having same sold, also inured to the benefit of both sureties, and unless there was fraud upon the part of appellant, which is not alleged, the transaction is binding and valid.

3. If the purchaser of the title at the sale, should be adjudged to have taken the property subject to the Gastineau mortgage, this mortgage, inuring to the benefit of both parties, cannot be enforced as against appellant.

AUTHORITIES CITED.

McMahon v. Fawcet, 14 Am. Dec., 796; Farmers' National Bank v. Snodgrass, 54 Am. St. Rep., 797; Hoover v. Mower, 84 Iowa, 43; 35 Am. St. Rep., 293, and note; Extended notes to Gross v. Davis, 10 Am. St. Rep., 642, and Hall v. Cushman, 43 Am. Dec., 563; Bolin v. Metcalf, 71 Am. St. Rep., 898; Morrison v. Poynts, 7 Dana, 307; Goodloe v. Clay, 6 B. Mon., 236; Moore v. Moberly, 7 B. Mon., 299; Eaton on Equity, page 508, sec. 249; Commissioners of McDowell County v. Nichols, 92 Am. St. Rep., 785; Roberts v. Cooper's Assignee, 12 Ky. Law Rep., 112; May v. Patterson, 13 Ky. Law Rep., 779; Basley v. Taylor, 5 Dana, 157; Hutson's Adm'r v. Combs, 110 Ky., 672.

BEN V. SMITH and T. Z. MORROW for appellee.

The contention of appellee is that the relationship of the parties as joint sureties and as joint grantees in the conveyance of the equity of redemption, inured to the benefit of both, subject to the prior lien of appellee for the money paid out by him and this was the view of the chancellor. (Ky. Statutes, sec. 1709.)

Digitized by Google

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

The appellant, Walter Elrod. and the appellee, William M. Gastineau, on the 27th day of January, 1891, became joint sureties on the bond of William Lee as guardian for Ephraim C. Musser, a minor. On the 11th day of February, 1891, Lee executed to Gastineau a mortgage on certain real estate described in the petition to indemnify him from loss by reason of his suretyship on the bond. Prior to the execution of the guardian's bond, Lee had executed and delivered to John Griffin a mortgage on the same property to secure a debt due to him. Griffin having died, his administrator instituted an action in the Pulaski circuit court to enforce the mortgage lien of his decedent, and for a sale of the property to pay the debt which it secured. Gastineau and Elrod were not made parties to the suit, but both seem to have known of its pendency. The property was sold under Griffin's judgment, but, as it did not bring two-thirds of its appraised value. the purchaser was not given possession. Afterwards, William Lee conveyed his equity of redemption in the property to the appellant and appellee to secure them against any loss by reason of their being his sureties on the guardian's bond. He had become indebted, and being sued, a judgment was rendered in the ward's favor for the sum of $331. Execution issued on this judgment, and was levied upon his equity of redemption in the property. At a sheriff's sale under the execution, the equity of redemption was purchased by the appellant for the sum of $175, which was paid to the sheriff, and applied to the extinguishment of the ward's debt, leaving a balance of $156, which was satisfied by the sureties each

Digitized by Google

paying $78. Appellant, Elrod, having paid the purchase price of $175 to the sheriff, redeemed the property from the original purchaser under the Griffin judgment by paying to him $190, being the amount he paid with 10 per cent added; he also paid $14 taxes due upon the land. Appellee Gastineau, being of opinion that the purchase by his co-surety redounded to his benefit, instituted this action against him, claiming a lien for the sum of $78 he had paid as above stated, and praying that it be enforced, and the property sold for the purpose of satisfying his debt. The chancellor sustained this position, adjudging him a lien for the amount he had paid out as surety for William Lee, subject to Elrod's lien for the amount he had paid to the purchaser under the Griffin judgment—$190—and the sum he had paid at the sheriff's sale for the equity redemption—$175; any overplus after these sums were paid was to be divided equally between the appellant and the appellee to the extent of $156. The judgment also ordered a sale of the property to carry its provisions into effect. To reverse this judgment, the appellant prosecutes this appeal.

It is conceded by both parties to this litigation that, when a principal conveys or pledges property to one surety to indemnify him from a loss by reason of the suretyship, this conveyance or pledge redounds to the benefit of all co-sureties. This principle is well settled, and rests upon the presumption that the principal will not discriminate between those who stand toward him in the same relation, or if he does intend so to discriminate, then it is a fraud on the other sureties, to turn over to one of them property which should be held to indemnify all jointly. Brandt on Suretyship, section 268; Moore v. Moberly, 7 B. Mon. 299. And, under this principle, there is no doubt that

Digitized by Google

the mortgage given by Lee to Gastineau redounded to the benefit of the co-surety, Elrod, and, of course, the conveyance by Lee to them of his equity of redemption was for their joint indemnity. But that is not the question we have here. The guardian, Lee, could not, and did not intend to, convey his property to his sureties to the injury of his ward, Musser, but only to indemnify them against loss by their payment of the judgment rendered against them as his sureties. Therefore, when the execution issued on the judgment of the ward against the guardian the sheriff very properly levied it upon the only property he had, which was his equity of redemption in the land sold under the Griffin judgment; and when the sheriff advertised the sale of the property levied, the question arose which must be answered in this case: Might one of the sureties bid at that sale in his own interest without regard to the interest of his co-sureties?

It will be observed that the principle which invests all sureties with an interest in any property given by the principal debtor to any surety, has no application to the situation we now have under consideration. The state of affairs now presented was not brought about by any act of the principal; nor was he turning over property to one surety to the exclusion of the other. The property is, indeed, that of the principal, but it is taken by the hand of the law for the purpose of satisfying a debt for which the sureties were bound by the terms of the bond. The common interest of both the sureties was involved in having that property bring its highest market value, because the proceeds of the sale were to be applied to the discharge of their joint liability; and, therefore, it was much to their interest that the bidding should be open and free to every competitor who desired to purchase the property. The rights of the sureties as sureties in the property were

Digitized by Google

to be exhausted by this sale because they were to get its proceeds applied to a debt they owed, and which, if not satisfied by the price of the land, they would have to pay. Unless the sureties were left free to protect themselves by seeing that the property brought its full price, they would necessarily be deprived of a very valuable right. A surety would be loth to bid at such a sale if, after his money was paid in for the property, and applied for the joint benefit of himself and co-sureties, he should discover that his purchase, if it turned out to be a profitable one, was for the benefit of his co-sureties, who had done nothing to advance the interest of the sale; and, on the other hand, if the purchase (as it might be) turned out to be unprofitable, the loss would fall upon him alone. Let us suppose that, upon the land in question there was a building which constituted (as is sometimes the case) the real value of the property as a whole, and that after the sale had been made to appellant, and his money paid in to the sheriff. and his redemption money turned over to the purchaser in the Griffin sale, the house burned. Could the purchaser then have called on his co-surety to make good to him one-half of the loss on his purchase? If this had happened, and appellant had made such a demand upon the appellee, would he not have been met with the answer: "You purchased the property on your own initiative, and without authority from me, and therefore you must stand the loss." Undoubtedly, this answer would have been made, and, when made, would have truly stated the legal status of the parties with reference to the purchase. The difference between the attitude of a surety who takes a pledge of property of the principal debtor to indemnify him against loss by reason of his suretyship towards his co-sureties, and that which he occupies toward them

Digitized by Google

as purchaser of the principal's property at a sale such as that under consideration, is that in the first case the consideration is the suretyship, and this is furnished by all the sureties on the obligation; therefore, the consideration moving from all, the property must indemnify all. In the latter case, the property is being sold in order to furnish that for which it was conveyed—the common indemnity of all the sureties. The consideration of the sale here is the individual money of the purchaser, and in a purchase so made the co-surety who furnishes none of the consideration has no interest.

The judgment is reversed, with directions to dismiss the petition.

CASE 79.—ACTION BY LEONARD HOLLAND AGAINST LULA BERRYHILL FOR SLANDER.—February 14.

Berryhill v. Holland

Appeal from Graves Circuit Court.

R. J. Bugg, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Infants—Judgments—Effect.—Where an infant was sued for slander and was served with process, and no guardian or guardian ad litem was appointed for him, and no evidence was heard by the jury, a judgment rendered against him pro confesso was erroneous, but not void.
2. Same—Judgment—Vacation.—Under Civil Code Prac., section 518, the trial court may vacate or modify a judgment against an infant after the expiration of the term, where the disability

Digitized by Google

of the defendant did not appear in the record; there being no remedy by appeal.

3. Same—Proceedings to Vacate—Failure to Verify Petition—Effect.—The failure of plaintiff to verify his petition for the vacation of an erroneous judgment rendered against him while he was an infant, as required by Civil Code Prac., section 520, did not make the petition demurrable.

4. Same—Sufficiency of Petition—Allegations of Defense.—Though Civil Code Prac., section 520, requires a petition for the vacation of certain judgments to set forth the defense to the action, if the party applying is the defendant, a judgment awarded against an infant in a slander suit, without any defense by a guardian or guardian ad litem, and without any proof could not stand, though the infant in his petition for the vacation of a judgment did not set forth any defense to the action, since under the law all allegations against an infant must be proven, though not traversed.

HESTER & WALLACE and GREENE & VANWINKLE, attorneys for appellant.

POINTS AND AUTHORITIES CITED.

1. Infants over 14 must be served personally with process. (Civil Code, 48 and 52.)

2. Failure to appoint guardian ad litem renders judgment erroneous merely and not void. (Oliver v. Park, 39 S. W., 423, 19 Ky. Law Rep., 179; Kellar v. Wilson, 90 Ky., 350, 14 S. W., 332; Simmons v. McKay, 3 Bush, 25; Pond v. Doneghy, 18 B. Mon., 558; Smith v. Ferguson, 3 Metc., 424; Richards v. Richards, 10 Bush, 617; Norfleet's Adm'r v. Logan, 54 S. W., 713, 21 Ky. Law Rep., 1200; Myers v. Pedigo, 72 S. W., 734, 24 Ky. Law Rep., 1923.)

3. Proper procedure in case of erroneous judgment. (Sections 391 and 518, sub-sec. 5, Civil Code; see also case of Camp v. Second Nat. Bank, 3 Ky. Law Rep., 326; Jaggard on Torts, p. 159; Drane, &c., v. Pauley, &c., 8 Ky. Law Rep., 530; Hill v. Becker, 9 Ky. Law Rep., 619; Rogers, &c., v. Aulick, 2 Duvall, 419; Norfleet's Adm'r v. Logan, 21 Ky. Law Rep., 1201; Allen &c., v. Troutman's Heirs, 10 Bush, 62; Park v. Bolinger, 10 Ky. Law Rep., 306; Louisville Tobacco Warehouse Co. v. Wood & Bumgardner, 26th Ky. Law Reporter, 772.)

Digitized by Google

W. J. WEBB, attorney for appellee.

QUESTIONS MADE AND AUTHORITIES CITED.

The infancy of the defendant not being disclosed, and the judgment being for tort, he had no remedy either by appeal, or motion for new trial and the judgment was void. (Civil Code, section 391; Civil Code, section 518-5.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On June 5, 1901, Lula Berryhill filed a petition in the Graves circuit court against Leonard Holland, alleging that he had slandered her, by uttering on different occasions words charging her with fornication. The petition did not show that the defendant was an infant. Summons was issued upon it which was served upon the defendant. No answer having been filed to the petition, its allegations were taken as confessed, and a jury was sworn, who without hearing evidence returned a verdict against the defendant for the sum of $5,000. On October 14, 1904, an execution was issued on the judgment, which was levied upon a tract of land belonging to the defendant. The land was sold by the sheriff for $100 and purchased by the plaintiff. On February 21, 1905, Holland brought this suit against Lula Berryhill, setting out the above facts, and alleging that he was at the time an infant 17 years of age; that no guardian ad litem was appointed for him in the suit in which the judgment was rendered; that the fact that he was an infant was not disclosed in that action; and that no evidence was heard by the jury. He prayed that the judgment and proceedings be declared null and void. The defendant demurred to the petition, her demurrer was overruled, the case then submitted, and the court entered a judgment as prayed. From this judgment she appeals.

Digitized by Google

As the defendant was served with process in the slander suit, and was properly before the court which had jurisdiction of the action, the judgment was not void; but, as the defendant was an infant, no judgment could properly be rendered against him until the regular guardian or a guardian ad litem made defense or filed a report stating that after careful examination of the case he was unable to make defense. Civil Code of Practice, section 36. The petition could not be taken as confessed against the infant. Its allegations were traversed by law, and no judgment could be rendered upon the petition against the infant without proof. Civil Code of Practice, section 126. The judgment against the infant was therefore erroneous.

Where an erroneous judgment is rendered against an infant, and the error is apparent upon the face of the proceedings, the remedy is by appeal. An appeal may be prosecuted by the infant at any time during his infancy, or within one year after the removal of his disability; but, where the error is not shown on the face of the record, there can be no remedy by appeal. In this state of case the remedy is given by section 518 of the Civil Code of Practice, which provides, among other things: "The court in which a judgment has been rendered shall have power, after the expiration of the term, to vacate or modify it, * * * for erroneous proceedings against a person under disability, except coverture, if the condition of such defendant do not appear in the record, nor the error in the proceedings." Here the condition of the defendant did not appear in the record, nor the error in the proceedings. In section 520 of the Civil Code of Practice it is also provided: "The proceedings to vacate or modify the judgment on the grounds mentioned in subsections 4, 5, 6, 7, and 8 of section 518, shall be by petition verified by affidavit, setting forth the judg-

Digitized by Google

ment, the grounds to vacate or modify it, and the defense to the action if the party applying was defendant. On the petition the proceedings shall be the same as those in the action in which the judgment was rendered."

It is insisted for the appellant that the petition in this case was not verified by affidavit. Advantage might have been taken of this in the circuit court by a rule to verify the petition, but it is not ground of demurrer. It is also insisted that the petition does not set forth any defense to the action of slander, and that for this reason it is not sufficient under section 520 of the Civil Code of Practice. There would be much force in this objection, if the defendant had not been an infant at the time the judgment was rendered against him, and if the law had not provided that all allegations of a petition against an infant must be proved, though not traversed. Here there has been a judgment for $5,000 against an infant, without any defense by a guardian or a guardian ad litem, and without any proof. Such a judgment cannot be permitted to stand. The circuit court should not have adjudged the judgment and execution sale void, but he should have entered an order setting aside the judgment and execution sale and allowing the defendant, who is now of age, a reasonable time to file an answer in the slander suit. On the return of the case to the circuit court, the original action will be placed again on the docket. The judgment and all proceedings under it will be set aside. An order will then be made suggesting that the defendant is now of age, and giving him reasonable time to answer. If he fails to answer within the time given, the petition may then be taken for confessed, as he is now of age.

Judgment reversed, and cause remanded for further proceedings consistent herewith

Digitized by Google

CASE 80.—ACTION BY LEWIS EVANS AGAINST THE EASTERN KENTUCKY TELEPHONE & TELEGRAPH CO., FOR DAMAGES FOR NEGLIGENTLY BURNING HOUSE.—February 14.

Evans v. Eastern Ky. Tel'p. & Tel'g. Co.

Appeal from Lee Circuit Court.

ROBERT RIDDELL, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

Telephones—Damage by Lightning—Question for Jury.—A patron of a telephone company notified the company to remove the box and wires from his house. The company removed the box, but left the wires so exposed that they were struck by lightning, damaging the house. In an action by the owner of the house for damages, Held, That it was a question for the jury whether the company had used such care as might be reasonably expected of a person of ordinary prudence in failing to remove the wires, and whether the plaintiff, by his want of care, contributed to the loss by suffering the wires to remain in the house, when by ordinary care he should have known of the danger.

S. P. STAMPER, attorney for appellant.

Errors of law complained of.

1. Because the court erred in excluding from the jury evidence offered by appellant that tended to show that the lightning followed defendants wire into his house at the place where defendant had taken away the box leaving the wires attached to the house.

2. Because the court instructed the jury to find a verdict for the defendant. (Wharton's negligence, sec. 77; Andrew Jackson v. Wis. Tel. Co., 26 L. R. A., 101; 1st Greenleaf on Evidence, section 51.)

Digitized by Google

HENRY WATSON, attorney for appellee.

Our contention is that the court did not err in taking the case from the jury for the following reasons:

1. That under the proof before the court the plaintiff could not recover.

2. Appellant contributed to the injury, if there was injury, by permitting the wires to remain in his house, and the lightning being the act of God, defendant is not guilty.

AUTHORITIES CITED.

Thompson on Negligence, sections 168, 172, 178; Central passenger Ry. Co. v. Stevens, 17 Ky. Law Rep., 803; L. & N. R. R. Co. v. McCoy, 81 Ky., 415; Cumberland Tel'p. & Tel'g. Co. v. Morton's Adm'r, 76 S. W., 394; Lawson on Rights and Remedies, vol. 4, sec. 1810.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

Lewis Evans owns a house and lot in the town of Proctor, Lee county, Ky. In August, 1902, he made a contract with the Eastern Kentucky Telephone & Telegraph Company by which it placed a telephone box in his house connected by wire to the defendant's exchange, and he agreed to pay it the sum of $1 a month for a period of 12 months for the use of the telephone. At the end of the year he notified the telephone company to remove the telephone box and wires from his house. It took out the telephone box, but failed to remove the wires, simply cutting them loose from the telephone box and leaving them in the house. Thus things stood until July 10, 1904, when there was a severe thunderstorm and the lightning struck a locust tree not far from Evans' house to which the wire of the telephone company was attached. The lightning tore up the tree and passed along the wire into the house, tearing up the room in which the wires

Digitized by Google

had been left and damaging the property. The wires had remained in his house about 10 months after the telephone box was taken out before the house was struck by lightning During this time Evans knew that the wires were still in the house, but did not request the telephone company to take them out, not knowing that it was dangerous for the wires to remain attached to the house after the box had been taken away, this being the first experience he ever had with a telephone. He sued the company for damages to the house, charging that the loss was due to its negligence. The defendant filed an answer denying the allegations of the petition. On the trial the plaintiff proved, in substance, the facts we have stated. The court peremptorily instructed the jury to find for the defendant. This was done, and, judgment having been entered dismissing the plaintiff's petition, he appeals.

It is insisted that the loss was due to the act of God, and that the plaintiff was as much responsible for the trouble as the defendant. While lightning is the act of God, the carrying of the lightning in the plaintiff's house on its wire which it had left in the house was the act of the defendant, and it was a question for the jury whether the defendant had used such care as might be reasonably expected of a person of ordinary prudence under the circumstances. The plaintiff had ordered the defendant to take out both the box and the wires, and it was a question for the jury whether he, by his want of care, contributed to the loss, or acquiesced in the wires remaining in the house when he knew, or by ordinary care should have known, the danger. He had once notified the company to take out both the box and the wires, and, though he knew that they had not complied with his request, he may not have known that they had so left the wires

Digitized by Google

as to be a source of danger. In 27 Am. & Eng. Ency. of Law, 1017, the rule is thus stated: "In placing wires for conducting electricity into a house, a telephone company owes the persons living there the exercise of reasonable care, proportioned to the known dangers of the conditions to prevent the wires acting as conductors of lightning into the building, and it is liable for damages resulting from neglect to provide against this danger. Especially is it liable where damage from lightning occurs through its failure to remove its wires when the person living in the house has ceased to subscribe for a telephone."

Judgment reversed, and cause remanded for a new trial.

CASE 81.—ACTION BY GEORGE DINNING AGAINST JOE L. CONN'S ADMINISTRATOR AND OTHERS TO ENFORCE THE PAYMENT OF A JUDGMENT AGAINST THE ESTATE OF THE DECEDENT.—February 19.

Dinning v. Conn's Adm'r

Appeal from Jefferson Circuit Court, Chancery Branch (Second Divison).

SAMUEL B. KIRBY, Judge.

From the judgment plaintiff appeals. Affirmed.

Venue—Actions Against Administrators—Statutes.—The venue of an action by a creditor of a decedent, based on the ground that the administrator had wrongfully paid out the assets of the estate among other creditors is determined by Civil Code, sections 65, 66, providing that actions to settle the estate of a decedent, etc., must be brought in the county in which the

Digitized by Google

personal representative qualified, and not by section 78, providing that an action which is not regulated by the foregoing sections may be brought in any county in which defendant is summoned, etc.

BENNETT H. YOUNG, M. W. RIPY and L. W. YEAMAN, attorneys for appellant.

In this case relief is sought against the common creditors of the decedent alone, and not against the administrator. That the creditors who have been wrongfully paid more than their pro rata share can be compelled to so far refund as to accomplish an equalization among all creditors of like dignity and standing there can be no doubt, and the one question to be determined is whether the circuit court of Jefferson county has jurisdiction to make the necessary orders. We think it has.

BROWDER & BROWDER and GRUBBS & GRUBBS, for appellees.

(No brief in the record.)

OPINION OF THE COURT BY JUDGE SETTLE—Affirming.

This is an appeal from a judgment of the Jefferson circuit court, chancery branch, second division, sustaining a special demurrer to the jurisdiction of the court and dismissing the appellant's action.

The action was brought to enforce the payment of a judgment for $8,333.33 1-3, which the appellant, George Dinning, on May 5, 1899, obtained in the United States circuit court for the District of Kentucky, against the appellee Charles H. Conn, as administrator of the estate of Joe L. Conn, deceased, it being alleged in the petition that no part of this judgment has been paid although appellee had received as assets belonging to the estate of his intestate $3,000, which he paid to numerous creditors of the estate, all the creditors except appellant having received some part thereof; that the decedent died in Logan county, where he was then domiciled, and that appellee was

Digitized by Google

appointed by the Logan county court administrator of his estate, and in that court gave bond and duly qualified as such. It is further alleged in the petition that the creditors who received payment of their claims by the administrator were not entitled to priority over appellant, whose demand against the decedent's estate was of equal dignity with theirs. The administrator and several creditors of the decedent to whom the administrator distributed the assets of the estate were made defendants to the action, and the amount paid each creditor by the administrator set forth in the petition. The administrator still resides in Logan county, as do many of the creditors. Some of the creditors live in the city of Louisville, and some in other parts of the State. It does not appear from the averments of the petition, whether the administrator has fully administered the decedent's estate, or whether he has made a final settlement of his accounts as administrator. Nor is it alleged that he had not distributed to the decedent's creditors all of the assets of the estate before appellant's judgment was obtained. By the prayer of the petition judgment was asked, ordering the creditors to pay into court the amounts received by them, respectively, from the administrator, or so much thereof as to the court might seem just, and directing a correct and just distribution of the assets.

The only question presented for decision by the appeal is, had the Jefferson circuit court jurisdiction of the subject of the action and the parties? Civil Code, section 428, provides: "A representative, legatee, distributee, or creditor of a deceased person, may bring an action in equity for the settlement of his estate." Sub-section 2 provides: "The representative of the decedent, and all persons having a lien

Digitized by Google

upon, or interest in the property left by the decedent, or any part thereof, and the creditors of the decedent, so far as known to the plaintiff, must be made parties to the action, as plaintiffs or defendants." Section 65 requires that: "An action to settle the estate of a deceased person must be brought in the county in which the personal representative was qualified. * * *" Section 66 provides: "An action for the distribution of the estate of a deceased person, or for the partition among the heirs, or for the sale for the payment of his debts, of property descended from or devised by him, must be brought in the county in which his personal representative was qualified." It is insisted for appellant that the venue of this action is fixed by section 78, Civil Code, which provides: "An action which is not required by the foregoing sections of this article to be brought in some other county may be brought in any county in which the defendant, or in which one of several defendants who may be properly joined as such in the action resides or is summoned."

If appellant is right in this contention, it is patent that the court erred in dismissing the action. But we do not think the contention tenable. The action must be regarded as one to settle or distribute the decedent's estate. It proceeds upon the theory that the administrator has wrongfully distributed or paid out all the assets of the estate among the creditors of of the estate, except the appellant, whose demand was of equal dignity with those paid. If the relief asked is granted, it will necessitate inquiry into the administration of the estate as made by the administrator, and consequently not only involve an investigation of such settlement as he may have made with the Logan county court, but may require of him an additional settlement, after the several creditors whose claims

Digitized by Google

have been satisfied in whole or in part shall have been made, by rule, to repay in large measure what they have received. While the word "distribution" is generally used to indicate a divison among legatees, or heirs of the personal estate of a decedent, it is likewise often used as referring to the payment of the decedent's debts by the administrator. The expression "distribution among creditors" is by no means uncommon in the law books Manifestly, the granting of the relief sought by appellant in the case at bar is a matter affecting the administration of the estate, and, this being true, there is no escape from the conclusion that only the circuit court of the county in which the administrator qualified, and the estate has been wholly or partially administered, has or can have, jurisdiction of the case. In other words, the venue of the action is determined by sections 65 and 66 of the Civil Code. Newman's Pleading & Practice, p. 23.

It therefore follows that the demurrer to the jurisdiction was properly sustained by the lower court.

Wherefore, the judgment is affirmed.

Digitized by Google

CASE 82.—ACTION BY R. P. BRACKEN AND OTHERS AGAINST W. E. NICOL TO REQUIRE HIM TO PAY THE PAR VALUE OF CERTAIN BANK STOCK ISSUED TO HIM.—February 19.

124 628
1136 842
136 843

Bracken, &c. v. Nicol

Appeal from Simpson Circuit Court.

W. P. SANDIDGE, Circuit Judge.

Judgment for defendant. Plaintiffs appeal. Affirmed.

Banks and Banking—Stockholders—Transferring Stock—Good Faith—Entry on Books—Liability—A shareholder in a corporation, although a director, who in good faith, free from any suspicion of fraud, or to escape liability, sells his stock and requests the officers in active charge of the corporation, who have control of its books in making the transfer, to do everything that is necessary to perfect such transfer in a legal way, and is informed by them that there is nothing more to be done, will be relieved from future liability as a shareholder, although no book was kept by the corporation in its principal office, in which all transfers of stock shall be entered, stating when, the number of shares transferred, and by and to whom, as required by Kentucky Statutes, section 546.

ROARK & FINN, C. W. MILLIKEN and G. W. WHITESIDES, attorneys for appellant

POINTS AND AUTHORITIES.

1. A director whose duty it is to see that the bank complies with the law and keeps a stock book is estopped from pleading the bank had no such book. (Beals v. Buffalo Ex. Metal Co., 49 N. Y. App. Div., 589; Cook on Corp., note on p. 561.) Where the stock itself or any statute provides for a transfer on the books of the company the transfer should be so made to relieve the

Digitized by Google

stockholder. (A. & E. Enc., 2nd Ed., vol. 26, p. 1039; A. & E., 2nd Ed., vol. 26, p. 881; A. & E. Enc., 2nd Ed., vol. 26, p. 884; Cook on Corporations, p. 570; Cook on Corporations, p. 853; Morse on Banks and Banking, sec. 679; Johnson v. Laflin, 103 U. S., 800; Kreigor v. Hanover National Bank, 72 Miss., 462; Ky. Stats., sec. 545, 546, 595.)

2. What the stockholder must do in order to get the transfer on the books. (Earle v. Carson, 60 L. R. A., 266; Cook on Corporation, p. 560.)

LEWIS McQUOWN and GEO. C. HARRIS for appellee.

1. Our contention is that the responsibility of the stockholder ceases when he has sold and delivered the assigned certificate of his stock in good faith, and directed the transfer to be recorded. Especially is this true when the official upon whom he has the right to rely agrees to make the transfer, and he had no reason to suspect that he will not comply with his promise.

2. The failure of a bank to keep a book, and of its executive officers to enter a transfer of stock therein, should not be visited upon the head of an innocent stockholder who in good faith has done everything which he was advised by the cashier was necessary in order to pass the title to the stock.

3. Courts will lean to that construction of the statute which will uphold a transaction as consummated when the good faith of all the parties is unquestionable.

4. The construction contended for by appellant is not only opposed to the rule of the courts, but it likewise conflicts with the interpretation of statutes in derogation of common right.

5. The statutes of limitation of two years, and five years, are plead and relied on, and are a complete bar to the action.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

There is no issue of fact involved in this controversy.

The appellee, Nicol, became the owner of 10 shares of stock of the par value of $100 each in the J. A. McGoodwin Banking Company, on the date of its organization in June, 1893, and retained possession of the stock until February 15, 1899, when he sold it to J. K. Caldwell, then president of the institution,

Digitized by Google

for $1,000 in cash. At the time of the sale, and for some years prior thereto, appellee had been a director in the bank, but ceased to be an officer upon the sale of his stock to Caldwell. The sale was made in good faith, for a full and valuable consideration, and at the time the bank was perfectly solvent. When appellee made the sale, he took his certificate of stock, and went with Caldwell, the purchaser, to the bank, and informed J. A. McGoodwin, then cashier, of the sale, and requested him to prepare the proper transfer in writing. McGoodwin then and there wrote on the back of the certificate the following transfer: "For value received, I hereby sell and transfer and assign to John K. Caldwell ten shares of the within-mentioned stock; and do hereby constitute and appoint J. K. Caldwell attorney to transfer the same on the books of the company." Thereupon appellee delivered the certificate to Caldwell, and received $1,000, which he deposited in the bank, and requested McGoodwin to do everything that was necessary to make the transfer legal, and asked him if there was anything more to be done, and McGoodwin told him, "No." All that was done in reference to the transfer was the written assignment mentioned. After the purchase of the stock, Caldwell, by virtue of his ownership of it, was elected a director in the bank, and received all dividends on the stock. The bank did not keep a stockbook or any book in which the name, post-office address or number of shares of stock held by each stockholder was recorded, or in which transfers of stock were made. The only record kept relating to stock was a book originally containing the certificates of stock, attached to stubs. When stock was sold the certificate was torn from the book, and on the stub remaining in the book, and which was separated from the certificate by a perforated line, was

Digitized by Google

written the name of the owner of the certificate detached, the number of shares, and date of issue.

In December, 1904, the bank became insolvent, and made a general assignment, and an examination of the stubs of the certificate book showed that there had been issued to appellee 10 shares of stock. There was no record that this stock had been sold or transferred to Caldwell, and this action was instituted by the assignee to require appellee to pay for the benefit of creditors the amount of the par value of the stock issued to him. The double liability of stockholders in banks being fixed by section 595 of the Kentucky Statutes of 1903, which provides that: "The stockholders of each bank organized under this article shall be individually responsible, equally and ratably, and not one for the other, for all contracts and liabilities of such bank to the extent of the amount of their stock at par value in addition to the amount of such stock, * * * and no transfer of stock shall operate as a release of any such liability existing at the time of such transfer, provided the action to enforce such liability shall be commenced within two years from the time of the transfer; and the directors of each bank shall in January of each year file with the Secretary of State a correct list of the stockholders and officers of such bank"

Conceding the facts to be as stated, appellant insists that appellee is liable under the statute because the shares of stock were not transferred in the manner provided in section 545 of the Kentucky Statutes of 1903, reading as follows: "The shares of stock shall be transferred on the books of the corporation in such manner as the by-laws thereof may direct, and every person becoming a stockholder by such transfer shall in proportion to his shares succeed to all the rights and liabilities of prior stockholders." And

Digitized by Google

section 546, which provides that: "A book shall be kept by every corporation in its principal office, in which shall be entered the name, post-office address, and number of shares of stock, held by each stockholder, and the time when each person became a stockholder; also all the transfers of stock, stating when, the number of shares transferred, and by and to whom. This book shall at all times during business hours be subject to the inspection of all the stockholders and persons doing buiness with the corporation." The sole question to be determined is: Did the failure of the bank to keep this book, and of appellee to have recorded in it the transfer of the stock to Caldwell, continue appellee, so far as the creditors were concerned, a shareholder in the bank, thereby making him liable under section 595, supra.

It is insisted by counsel for appellant that sections 545 and 546 are mandatory, and that the Legislature, in authorizing the creation of corporations, and providing for the issual of stock and fixing the liability of shareholders, declared the manner in which the stock might be transferred, and that it cannot be transferred in any other way so as to relieve the assignor from liability. These sections of the statute are important and useful, not only to the corporation, but to all persons having business with the corporation, and especially is this true respecting corporations upon the shareholders of which a double liability has been imposed by statute. The rights of persons dealing with corporations will be better protected when a corporation is required to and does keep a true and correct record of the names of its shareholders, and the other essential facts relating to the issual and transfer of stock, so that they may, if necessary, ascertain who the shareholders are, what

Digitized by Google

amount of stock they hold, when they became the owners of it by purchase or transfer, thereby enabling them to proceed, if necessary, directly against the shareholders. It is not our purpose, in construing this statute, to impair its value; nor is it necessary to preserve the purpose of its enactment that it should be so construed as to impose unnecessary hardships on persons guilty of a technical failure to comply with the letter of the statute.

The disposition of the question before us is simplified very much by the controlling fact that this transaction is entirely free from any suggestion of bad faith, or a desire to evade or escape the responsibility attaching to shareholders. All persons concerned in the transfer, including the president and cashier of the bank, who ought to have known what was necessary to perfect it, honestly believed that everything had been done that was necessary, and it would be most unreasonable to hold that appellee, who in the utmost good faith had done everything that he believed necessary, and all that he was told was necessary by the officers of the bank, should be held liable for their ignorance of the law relating to transfers of stock. The cashier was the custodian of the books of the bank, and it was his duty to note in proper form transfers of stock, and, when a shareholder sells his stock, and the cashier is directed to do everything necessary to make the transfer effective for the benefit of the bank and the public, and the transferer in good faith believes that he has done, or will do, this, the care or diligence required of him is discharged, and he will not be required to do more.

Appellee was a director in the bank, and it is argued that it was his duty as director to see that the law was observed, and that the book provided by sec-

Digitized by Google

tion 546 was kept in the bank of which he was an officer. And it is said that it opens the door to fraudulent practices and suggests means of escape to stockholders in failing institutions to establish a rule relieving especially officers of banks of the necessity of keeping the book required by the statute, and recording therein in proper manner all transfers of stock. It is possible, perhaps probable, that the failure on the part of the corporation to keep the book required, and to record in it purchases and transfers of stock, may in exceptional cases enable a dishonest shareholder to escape liability imposed by statute; but the apprehension that a fraud of this character may occasionally be practiced will not justify the court in ruling that, in a case absolutely free from any suspicion of fraud, a stockholder must be subject to a liability for a failure to observe the letter of the law. A director of a corporation, no more than any other stockholder, under circumstances similar to those existing in this case, should be held to do more than request and direct the officers in active charge of the corporation to do whatever is necessary to make the transfer effective.

Questions similar to this have been often the subject of judicial review, and the decided weight of authority is in favor of relieving from statutory liability stockholders whose conduct has been marked by the integrity of purpose manifested by appellee. Thus, in Cook on Corporations, section 258, it is said: "The general rule is that the transferer is not released from liability until the transfer is duly registered on the corporate books. This rule, however, is subject to an important exception, and this exception is that where a corporation accepts the transferee as a stockholder, and pays dividends to him, or where through the negligence or fault of the corporation no transfer

Digitized by Google

on the books is made, in such cases the transferer is released and the transferee only is liable on the stock, although the stock still stands on the corporate books in the name of the transferer. * * * Where a transferer signs a transfer on the back, and delivers the same to his broker, who sells the stock, and then presents the certificate to the corporation for transfer, and the corporation agrees to do so, but neglects to for a year, the transferer is not liable on the stock. * * * When the transferer has done all in his power to complete the transfer, and is guilty of no laches, his liability to corporate creditors is thereby determined and accordingly he is discharged as though the registry had been made." And this general rule is fully supported by Hunt v. Seeger, 91 Minn. 264, 98 N. W. 91; Foster v. Row, 120 Mich. 1, 79 N. W. 696, 77 Am. St. Rep. 565; Chemical National Bank v. Colwell, 132 N. Y. 250, 30 N. E. 644; Whitney v. Butler, 118 U. S. 655, 7 Sup. Ct. 61, 30 L. Ed. 266; Cox v. Elmendorf (Tenn. Sup.), 37 S. W. 387.

And so we hold that a shareholder in a corporation, although he may be a director, who in perfect good faith, and under circumstances free from any suspicion of fraud, or a desire to escape liability, sells his stock, and does everything connected with the transfer that he honestly believes is necessary to make it effective, and that a prudent business man should do, and who requests the officers in active charge of the corporation, and who have the control of its books in making the transfer, to do everything that is necessary to perfect it in a legal way, and is informed by them that there is nothing more to be done, will be relieved from future liability as a shareholder.

Wherefore, the judgment of the lower court is affirmed.

Digitized by Google

JUDGE NUNN (dissenting): I am of the opinion that the statutes referred to in the opinion are mandatory, and should be so held for the protection of persons dealing with the bank.

CASE 83.—AGREED CASE BETWEEN NELSON COUNTY AND THE CITY OF BARDSTOWN AS TO WHETHER THE CITY OR COUNTY SHALL MAINTAIN A CERTAIN BRIDGE AND TURNPIKE LYING WITHIN THE CITY LIMITS.—February 20.

124 636
127 123
127 131

Nelson County v. City of Bardstown

Appeal from Nelson Circuit Court.

C. T. ATKINSON, Special Judge.

From the judgment the county appeals. Reversed.

1. Municipal Corporations—Maintenance of Street—Highway Bought by County.—Where a county buys all the turnpikes in the county, under the free turnpike act (Ky. Stats., 1903, section 4748b), the part of one lying within a city must be maintained by it, as a public way thereof, though it has not exercised control over it.
2. Bridges—Maintenance—Liability of County and City.—Where a part of a turnpike within a county, bought by it under the free turnpike act (Ky. Stats., 1903, section 4748b), is a bridge, over a creek, the thread of which is the dividing line between a city within the county and the rest of the county, the entire expense of maintaining the bridge, which is entirely outside the settled part of the city, and is unnecessary for city purposes, and is essentially a county bridge, being required only for the travel to and from the county, is on the county.

NAT. W. HALSTEAD county attorney, and F. E. DOUGHERTY, attorneys for appellant.

Digitized by Google

AUTHORITIES CITED.

21 Ky. Law Rep., 196, 1634; Ky. Statutes, sec. 1851; Redfield on Negligence, 5th Ed., sec. 394; 25 Ky. Law Rep., 217.

REDFORD C. CHERRY, attorney for appellee.

POINTS AND AUTHORITIES.

1. It is the legal duty of the county to maintain all highways and bridges within such county, including all bridges and roadways within the cities which are not dedicated or used as streets for the convenience of the citizens thereof, except where such roadways are placed under the exclusive control and management of the city. (Kentucky Statutes, sec. 4748b; Kentucky Statutes sec. 4302.)

2. By charter of cities of the first, second, third and fourth classes of Kentucky, exclusive control of all roadways within the corporate limits is given to the city; while by charters of the fifth and sixth class cities a mere discretion to repair such avenues is given, which discretion cannot be controlled. (Sec. 3643, Ky. Stats., (charter 5th class cities); sec. 3706, Ky. Stats., (charter 6th class cities); sec. 3560, Ky. Stats., (charter 4th class cities); Trustees, &c., v. McNabb, 23 Ky. Law Rep., 811; Danville v. Fiscal Court Boyle County, 21 Ky. Law Rep., 196.)

3. The roadway and bridge in controversy having been acquired by appellant county in the year 1898, and since said time having been maintained by the county by taxation of the citizens thereof, both within and without the city, and said roadway, although within the city, being around a precipitous bluff, is not now, and never can be used as a street, and is not now and never can be used for the convenience of the citizens of the municipality, and therefore, the legal duty devolves upon the county to keep same in repair. (Leslie County v. Wooten, 25 Ky. Law Rep., 217.)

4. When all county highways and bridges in the county are maintained by taxation, as in the case at bar, and the citizens within the city contribute equally and in common with the people of the county towards the maintenance of such highways, it would be very inequitable and unjust to require the citizens of the city to exclusively maintain a bridge or highway which is not used for the convenience of the citizens of the town but for the convenience of the people of the county. (Leslie County v. Wooten; Trustees of Town v. Hardin County (MS. opinion filed February 9, 1877.)

Digitized by Google

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

The fiscal court of Nelson county under the free turnpike act (Ky. Stat., 1903, section 4748b), acquired all the turnpikes in the county by purchase some years ago. One of these pikes leading into the city of Bardstown from the east runs from Bloomfield to Bardstown, and another from Springfield to Bardstown. The eastern boundary of the city of Bardstown from a point on the Town Fork of Stuart's creek, and the south edge of Duke street, is as follows: "Thence up said Town Fork of Stuart's creek, with its meanders, to a point opposite the terminus of the Bardstown branch of the Louisville and Nashville Railroad." The two pikes come together at a point 30 yards east of the creek referred to, and run thence as one road into the city, crossing the creek over a bridge. The bridge was built and maintained by the turnpike companies, and they also constructed and owned the pike from the bridge for some distance to its intersection with one of the streets of the city. This is an agreed case filed by the city of Bardstown and the county of Nelson to obtain a judicial determination as to whether the city or the county shall maintain so much of the turnpike and bridge as lies within the city limits. As to the turnpike the rights of the parties are determined by the case of Board of Council of Danville v. Fiscal Court of Boyle County, 106 Ky. 608, 51 S. W. 157, 21 Ky. Law Rep. 196. In that case, after quoting the various provisions of the statutes, we said: "Construing all these statutory provisions together, we think they mean simply that the turnpikes, when purchased by the fiscal court, become public highways; the part lying within the city,

Digitized by Google

being a public way, should be controlled by the city, and the part without the city, falling within the fiscal court's jurisdiction, should be controlled by it. Any other construction would create great confusion. To illustrate: Suppose the fiscal court undertook to keep the pike in repair, and, after it had fixed it as it thought best, the city council should conclude that the interests of the city require it should be fixed differently; it is very clear that, if the fiscal court has the power to control, it could require the city council to leave the way as it had fixed it, however much this might be to the detriment of the city. The city might require a vitrified brick pavement, or a smooth asphalt, when the fiscal court might think that rough cobblestones were much to be preferred. Or, again, suppose the boundary of the city as now located includes no part of one of these pikes, and it should be extended so as to take in a mile of it 10 years from now; why should the mile of pike so taken in stand differently from any other county highway taken into the city by the extension of the boundary? Or, if a new town should be located on one of these turnpikes 20 years from now, why should not the part of the turnpike in the town used as a street stand just as any other county highway taken in its boundary."

It is insisted that that case is not in point, for the reason that Danville is a city of the fourth class, and by section 3560, Ky. Stat., 1903, the public ways of a city of the fourth class are under the exclusive management and control of the city. But the reasoning of the court is applicable to all cities and towns. In 2 Smith on Municipal Corporations (section 1277), it is said: "A street is a road or public way in a city, town, or village, and the purpose for which it is laid out and made use of determines its character." Section 3643, Ky. Stat., 1903, governing cities of the fifth

Digitized by Google

class, provides: "The city council is hereby authorized and empowered to order any work they deem necessary to be done upon the sidewalks, curbing, sewers, streets, avenues, highways, and public places of such city. The cost and expense incurred in constructing or repairing streets, avenues, highways, sewers, and public places shall be paid out of the general fund of the city." The power of the city council over its streets and public ways under this statute is broad enough to include everything made necessary for the sufficiency of the public ways for the purposes of travel, and, while the statute does not use words declaring the power of the city council exclusive, the necessary effect of the statute is the same as if such words had been used. We therefore conclude that the burden is upon the city, and not upon the fiscal court, to maintain so much of the pike as lies within the city. The fact that the city has not exercised control over the pike is immaterial. It became a public way of the city by operation of law when it became a free pike.

As to the bridge, however, a different question is presented. It is true that, as the creek is the boundary between the town and the county, the line follows the thread of the stream, and so much of the bridge as is west of the thread of the stream is within the city. Still, bridges of this sort stand differently from a street. The citizens of the city are taxed in common with the citizens of the county to maintain all the county bridges, and, if the fiscal court is required to maintain the bridge, the city will bear its proportion of the burden in common with the rest of the county. For this reason a different rule must be applied between the city and the county as to bridges of this sort from that which is applied between two cities or between two counties as to a bridge spanning a stream

Digitized by Google

which is the dividing line between them. In Trustees of Elizabethtown v. Hardin County Court, a manuscript opinion filed February 9, 1877, and quoted with approval in Leslie County v. Wooten, 115 Ky. 850, 75 S. W. 208, 25 Ky. Law Rep. 217, it is said: "While the town must keep its streets and alleys in repair, it cannot be said that such a structure as this is to be regarded as a part of the street for the purpose of compelling its population to rebuild or repair it. It is within the county as well as the town limits, and is that character of improvement required to be made by the county court when the necessities of the public demand it." See, also Clay City v. Roberts, etc (filed February 13, 1907), 99 S. W. 651, 30 Ky. Law Rep. 820.

The bridge in question is on a thoroughfare traveled by a large portion of the inhabitants of the county in reaching the county seat and the railroad station. It is essentially a county bridge, and indispensable for the use of the county, and is such a structure as the fiscal court should maintain. It is entirely outside of the settled part of the city; it is not necessary for city purposes; it is only nominally to any extent within its boundary, and, under the principles of the opinions cited, should be maintained by the fiscal court. It is incumbent on the fiscal court to build such bridges in the county as the county requires; and the citizens of a town will not be required to build a bridge for the county, though it may be located in the town. To illustrate: A ford in the case before us might serve the purposes of the town, while a bridge is necessary for the interests of the county; or, as in the Leslie county case, the cost of building the bridge required really by the county might be such a burden as would destroy the town. The entire

Digitized by Google

burden of building and maintaining a bridge on a county highway, though wholly within the boundaries of a town, has been placed on the county where from the size of the town, the character of the bridge, the travel over it, and other circumstances, this was just and right. But ordinarily where a bridge is within a city, and is necessary for city travel, as well as the traveling public of the county, as between the public and them, the burden rests on both the city and county (Paintsville v. Commonwealth, 55 S. W. 915, 21 Ky. Law Rep. 1634), and should be apportioned between them in the proportion that the travel over the bridge within the city bears to the travel over it to or from the county outside of the city. If they cannot agree upon it, then either may rebuild or repair the bridge when necessary, and recover from the other its proportion of the cost. Waupun v. Chester, 61 Wis. 401, 21 N. W. 251, and cases cited. Culverts, or such small bridges as are essentially a part of the street, should be built and maintained by the city; but bridges which span streams, and are not fairly a part of the street, rest on a different ground, when they are for the common benefit of the people of the city and the people of the county outside of the city. In the case at bar, the bridge is not required for the purpose of urban travel, but only for the travel to and from the county and should be borne by the county at large. Section 1851, Ky. Stat., 1903, was construed in Richardson v. Boske, 111 Ky. 893, 23 Ky. Law Rep. 1209, 64 S. W. 919. It has no application. Bardstown is not separated by law from the remainder of Nelson county for county governmental purposes. A city street is radically different from a country road; it is usually much wider. Roads that are sufficient for rural travel are often wholly unsuited to urban purposes. The city street must be

Digitized by Google

controlled by the city authorities, for they can best judge as to the needs of the city, and what is best for its interests. But bridges over streams necessary for both country and city serve the purposes of both, and the burden of maintaining them should be borne as above indicated.

The judgment of the circuit court as to the bridge is affirmed; but, as to so much of the turnpike as lies within the city boundary, it is reversed, and cause remanded, for a judgment as herein indicated.

CASE 84.—PROSECUTION AGAINST JAMES A. SHIPP FOR MURDER.—February 20.

Shipp v. Commonwealth

124 643
133 397

Appeal from Taylor Circuit Court.

I. H. THURMAN, Circuit Judge.

Defendant convicted of murder and appeals. Reversed.

1. Criminal Law—Change of Venue—Duty of Court.—Where, on an application of defendant for a change of venue, the petition and affidavits complied with the statute and established a prima facie case, it was the duty of the court, in the absence of other evidence, to grant the change.
2. Same—Local Prejudice—Prima Facie Case.—Where, on an application by defendant for a change of venue for prejudice of the inhabitants of a county, the petition was in proper form, and it was supported by the affidavits of three citizens of the county, who stated that they were well acquainted with the public opinion, and that they verily believed the statements of the petition to be true, and were of the opinion

Digitized by Google

that defendant could not get a fair trial within the county, such petition and affidavits established a prima facie case.

3. Same—Evidence—Abuse of Discretion.—In a prosecution for homicide, defendant applied for a change of venue, and established that decedent was extensively related within the county; that his relatives were influential and prominent citizens so numerous that there was not a precinct in the county where some of them did not reside; that they were extremely hostile to defendant, and since the homicide had been active in framing public sentiment against him, and had so diffused highly colored reports purporting to be the facts of the homicide that the better element of the jurors of the county had formed opinions as to defendant's guilt; and that he could not get a fair and impartial trial in that county. On the hearing a dozen or more witnesses were introduced on each side and few, if any, of the State's witnesses claimed to know the sentiment in the county, merely stating their opinion that they believed that the people of the county would give any man a fair trial. Defendant's witnesses, however, swore that the feeling was strong against him; that lawyers had been advised not to engage in his defense; that several people had said he ought to be hung "crazy or not crazy;" and "that his relatives for 14 generations had died with their boots on." Held, that the denial of the application was an abuse of discretion.

4. Same—Curing Error—Summoning Jury from Another County.—After an application by defendant for a change of venue for local prejudice had been denied, the court attempted to get a jury within the county but failed. A jury was then ordered from another county, which, without the knowledge of either the trial court or defendant, was summoned by an important witness for the Commonwealth, and lodged at the house of Coffey, who, with her daughter, were also witnesses for the Commonwealth, the wife of the officer in charge of the jury being also cousin of both decedent and his wife. Held, that he summoning of such jury did not cure the error in the court's refusal of the change of venue.

5. Homicide—Motive—State of Mind—Evidence.—Where, in a prosecution for homicide, defendant pleaded insanity, and claimed that his act was the result of an alleged criminal intimacy between his wife and decedent, evidence that shortly before the killing defendant's wife confessed to him, in the presence of his son, a criminal intimacy with decedent, was admissible to show motive and defendant's state of mind at time of the killing.

6. Same—Declarations of Third Persons.—In a prosecution for

Digitized by Google

homicide, evidence that defendant's wife confessed her intimacy with decedent to defendant's son before the homicide was inadmissible, in the absence of proof that such confession had been communicated to defendant prior to the killing.

7. Same—Character of Third Persons.—Where, in a prosecution for homicide alleged to have been caused by decedent's criminal intimacy with defendant's wife, the wife was not a witness in the case and her reputation for chastity was not in issue, it was error to permit the Commonwealth to prove in rebuttal that the reputation of defendant's wife for virtue and chastity was above reproach.

8. Same.—Where, in a prosecution for homicide, it was claimed that defendant shot decedent because of his criminal intimacy with defendant's wife, and it was proved that she confessed such intimacy to defendant shortly before the homicide, the Commonwealth could break the force of such alleged confession by proof that the wife was not at the place where the confession was stated to have been made, or that defendant and his son, who claimed to have heard it, were not there at such time, or by impeaching the reputation of defendant and the son for truth and veracity.

9. Criminal Law—Misconduct of Counsel—Prejudicial Error.—In a prosecution for homicide alleged to have been occasioned by decedent's criminal intimacy with defendant's wife, after the court had erroneously allowed evidence of the wife's good character, counsel for the Commonwealth stated in his argument to the jury: "This great concourse of ladies and gentlemen have assembled here, not as a compliment to the speaker, but to attest by their presence the high regard in which Mrs. Shipp (defendant's wife) is held, and her good character." Held, that such argument was prejudicial error, and was not cured by the admonition of the court that the jury should not consider such statement.

10. Homicide—Voluntary Manslaughter—Instructions.—In a prosecution for homicide, an instruction on voluntary manslaughter that if the jury believe beyond a reasonable doubt that defendant shot and killed decedent in sudden heat and passion, and without previous malice, the jury should find him guilty of manslaughter, etc., was objectionable for failure to require the jury to find that the killing was willful or unlawful.

11. Same—Feloniousness.—An instruction on voluntary manslaughter need not require that the killing be "feloniously" done.

12. Same.—In a prosecution for homicide, an instruction on voluntary manslaughter should have charged that, if the jury

Digitized by Google

believed from the evidence beyond a reasonable doubt that defendant did willfully and not in self-defense shoot and kill decedent, and that the shooting was done in a sudden affray, or sudden heat and passion, without previous malice, and under such provocation as was ordinarily calculated to excite passion beyond control, they should find him guilty of manslaughter, etc.

13. Criminal Law—Trial—Misconduct of Counsel—Examination of Witnesses.—In a prosecution for homicide, it was prejudicial error for the Commonwealth's attorney, in cross-examining witnesses for defendant, to persist in asking improper questions, to which objections were sustained, as to whether one of them had killed a man, whether another had ever had occasion to arrest defendant, take him home, or get him to leave town, whether a witness was present when defendant got into trouble with another, and whether still another witness was the same man who testified on the motion for a change of venue that 14 generations of defendant's family had "died with their boots on."

LEWIS McQUOWN, HAZELRIGG, CHENAULT & HAZELRIGG and H. S. ROBINSON, attorneys for appellant.

1. We submit that the testimony of the appellant and his son to the effect that on Saturday before the killing the wife of appellant admitted criminal intimacy with the deceased was competent for the purpose, not of proving the fact of such intimacy, as no such issue was involved, but for the purpose of showing the mental condition of the husband when he met the deceased for the first time on the Monday following. Such admission if false in fact was as effective to produce the frenzy, or "sudden heat and passion" as if it were in fact true.

2. The wife not having testified her reputation is not involved and the attempt to show that her general reputation for morality was so good that she could not likely have made such a confession involves a proposition unheard of in the law of evidence.

3. It was competent to impeach appellant and his son so as to show that the wife made no such confession, but it was not competent to prove the truth or falsity of the facts alleged to have been imparted by the wife to her husband.

4. The true issue is did the wife make such admission, and the testimony of appellant and his son that she did, can only be destroyed in the usual way of impeachment. (State v. Slaten, 114 N. C., 818; Wall v. State, 125 Ind., 400; Omer v. Commonwealth, 95 Ky., 363; Massie case, 16 Ky. Law Rep., 791.)

Digitized by Google

JEFF HENRY, N. B. HAYS, Attorney General, and C. H. MORRIS, for appellee.

1. To entitle the defendant to a change of venue in a criminal case the burden is on him, at least, to make out a prima facie case. (Wilkerson v. Commonwealth, 88 Ky., 29; Hanson v. Commonwealth, 10 Ky. Law Rep., 1055.)

2. The trial court has a sound discretion in determining whether or not a motion for a change of venue shall be sustained, and its conclusions will not be disturbed unless palpably abused. (Howard v. Commonwealth, 15 Ky. Law Rep., 873; Wren v. Commonwealth, 8 Ky. Law Rep., 418; Hanson v. Commonwealth, 10 Ky. Law Rep., 1054; Crockett v. Commonwealth, 100 Ky., 382; Mount v. Commonwealth, 27 Ky. Law Rep., 788.)

3. An error pointed out for the first time in a motion for a new trial will not be considered on appeal. (111 Ky., 644; 22 Ky. Law Rep., 638; 23 Ky. Law Rep., 1231; 18 Ky. Law Rep., 857.)

4. The record does not disclose that there was an objection to the order directing the summoning of the jury from another county.

5. It is submitted that the good character of a party accused of crime, satisfactorily established, is an ingredient which ought to be submitted to the jury.

6. We submit that the testimony as to the good character of appellant's wife was competent to contradict the testimony of appellant and his son as to her alleged confession of infidelity to her husband. (Commonwealth v. Hourigon, 89 Ky., 35; Commonwealth v. Snapp, 90 Ky., 585; Scott v. Commonwealth, 94 Ky., 511; Howard v. Commonwealth, 80 S. W., 211.)

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

On January 3, 1906, appellant was indicted by the grand jury of Taylor county for the murder of Joe A. Smith. On the same day appellant filed his petition for a change of venue, accompanied by the affidavits required by the statutes. After hearing proof the court, on the ninth day of the January term, 1906, overruled the motion for a change of venue, and the defendant (appellant) was given until the April term to file his bill of exceptions. At that term of the court he filed his bill of exceptions, and renewed his motion for a change of venue, which was overruled. The case

Digitized by Google

then proceeded to trial, resulting in the conviction of appellant to the State penitentiary for the term of his natural life. The facts of the commonwealth, as shown by the testimony for the commonwealth, were about these: On the morning of December 1, 1905, appellant left the home of his sister in Phillipsburg, and boarded a train for Campbellsville. Arriving there, and while walking down the street, he discovered Smith, the deceased, standing some distance down the street on the opposite side. Appellant then entered a store near by, where he rented a gun for one hour's time (without informing the clerk, however, for what purpose he wanted it), loaded it, placed it under his arm, with muzzle pointing downward, walked down and across the street to where deceased was standing, and shot him in the left breast, killing him almost instantly. The proof for the commonwealth indicates that neither spoke a word. Appellant, however, testified, that upon approaching the deceased, he asked him, "Why did you ruin my home?" and then shot him. After the shooting appellant at once sought out the county judge at his place of business, surrendered, and was placed in jail, where he has remained since. Appellant's plea was not guilty, his real defense being insanity. He had been in a bad state of health for two or more years previous to the homicide. His afflictions, a disordered stomach, severe pains in the back of the head and neck, hay fever in the fall season of each year, annoyed him very much. About two months before the killing he began to suspect an undue intimacy between the deceased, Smith, and his (appellant's) wife. From that time on his physical and mental troubles and derangements seemed to become more aggravated and pronounced. He abandoned his business, traveled aimlessly about, roving from place to place, apparently

Digitized by Google

unbalanced in mind. He claimed to have converse with God, walked upon the highways gesticulating wildly and talking aloud to himself, often sitting for a long time in public places, with his face buried in his hands, weeping bitterly, and, when asked the cause of his trouble, would reply that his home had been ruined. On Saturday preceding Monday, the day of the killing, he claims his wife confessed to him her infidelity and improper conduct with Smith. He immediately left his home at Campbellsville and went to Phillipsburg to his sister's, as stated, returning about noon of Monday, the day of the killing. This was the first time he had seen Smith after the confession of his wife to him. From this judgment of conviction he has appealed, and the case was submitted for decision on the 25th of January, 1907.

Appellant assigns the following errors: First, the refusal of the circuit court to change the venue on appellant's motion. Second, the admission of incompetent evidence against appellant, and rejecting competent evidence offered by him. Third, that the court erroneously instructed, and refused to properly instruct, the jury. Fourth, the court's refusal to discharge the jury on account of the misconduct of counsel for the commonwealth during the trial.

We will take up the errors complained of in the order named.

The petition for a change of venue alleged in substance the following facts: That Smith, deceased, was extensively related in Taylor county; that his relatives were influential and prominent citizens, so numerous that there was not a precinct in the county where some relative of Smith did not reside; that they were extremely hostile to appellant, and, since the homicide, had been active in framing public sentiment

Digitized by Google

against him; that they had so diffused highly colored reports purporting to be the facts of the homicide that the citizens liable to jury service, the better element of jurors of Taylor county, had formed opinions as to the guilt of appellant; that, on account of the undue influence of Smith's relatives, the harsh and bitter feeling engendered against him by a concerted prosecution, he could not get a fair and impartial trial in Taylor county. Three citizens of the county, who stated that they were acquainted with the public opinion prevailing in the county, and that they verily believed the statements of the petition were true, in their respective affidavits, filed as required by statute, expressed it as their opinion that appellant could not get a fair trial in Taylor county. On the hearing of the motion for a change of venue a dozen or more witnesses were introduced on each side. Most of the commonwealth witnesses who testified on the hearing of this motion resided in or near Campbellsville, and few of them, if any, claimed to know the public sentiment in the county with reference to the prosecution, but each of them gave it as his opinion that appellant could obtain a fair trial; several of them stated that they knew the people of the county, and that they believed they would give any man a fair trial upon any charge. All the witnesses, however, agreed that the relatives of the deceased were prominent and influential, very numerous, some one or more of them residing in every precinct in the county. Many of the appellant's witnesses were persons whose business required them to travel over the county a great deal, who stated that they were acquainted with the public sentiment in the county existing against appellant with reference to the killing; that it was strong against him; that lawyers of the town had been advised not to engage in his defense; that to do so would greatly

Digitized by Google

injure their business; that they heard several people express themselves that Shipp ought to be hung; that the Shipps had killed enough people. One witness stated that "the Shipps for 14 generations had died with their boots on, and that that fact was pretty generally known." Another stated: "I have heard considerable discussion about this killing, and among those who claim to have heard the facts, or know the facts, the sentiment is pretty general that Shipp ought to be punished. I have heard some people speak bitterly of him." Some of them also testified that appellant's wife was very extensively related throughout Taylor county, and that her people were very bitter against him. They all agreed that it was their opinion that appellant could not have a fair and impartial trial in the county, and some of the witnesses stated that they heard people say that "Shipp ought to hang, crazy or not crazy."

Construing the statute providing for a change of venue, this court has announced the rule to be that, when the petition and affidavits comply with the statute, a prima facie case is thus made, and, in the absence of other evidence, it is the duty of the court to change the venue. See Higgins v. Commonwealth, 94 Ky., 54, 14 Ky. Law Rep., 729, 21 S. W., 231, and Wilkerson v. Commonwealth, 88 Ky., 29, 9 S. W., 836, 10 Ky. Law Rep., 656. The petition and affidavits filed in this case made out a prima facie case, and we are of the opinion that the evidence of the commonwealth did not overthrow it, but that the oral testimony on the whole strengthened it. In Bowman v. Commonwealth, 96 Ky., 8, 16 Ky. Law Rep., 186, 27 S. W., 870, the venue was directed to be changed by this court. It was there said: "The witnesses for the State, who think that appellant could obtain a fair trial, all save one or two, concur in the statement

Digitized by Google

that all those who had spoken on the subject regarded the shooting as a bad murder. * * * The witnesses for the defense, many, and perhaps all, of them, having but little interest in the defendant, he having lived in the county but a short time, stated that he could not have a fair trial by reason of the prejudice against his case, and the influence of those connected with the deceased." As in this case all the witnesses for the State concur in the statement that the belief was general that the homicide was a bad murder, and that appellant ought to be hung, or severely punished. From the statements of many witnesses it appears that many people in the county regarded the Shipp name as odious. It was common talk that the Shipps had killed enough people; that they had died with their boots on for many generations; that it only lacked a leader to form a mob that would have hanged appellant, crazy or not crazy. In view of this evidence, we are of opinion that the circuit court erred in not granting the venue asked for. The language of the statute is plain. It says that an application for a change of venue is to be granted "if it appears that the defendant cannot have a fair trial in the county where the proceeding is pending." In this case appellant has filed a petition for a change of venue, accompanied by the affidavits required by the statute. As we have seen, he had a prima facie case made out, and, when the commonwealth resisted the motion, and introduced oral testimony, then it was the duty of the court to weigh all the evidence and decide the case according to the right. The matter is in the discretion of the court, and ordinarily this court will not reverse the action of the lower court in such proceedings. But this court has the right of review, and when it appears to us that the discretion of the court has been

Digitized by Google

abused, it is clearly our duty to reverse. Howard v. Commonwealth, 15 Ky. Law Rep. 873, 26 S. W. 1. In reversing this case we are not in conflict with the opinions delivered by this court in the cases of Sacra, Guy Lyons, and Fletcher v. Commonwealth, 96 S. W. 858, 29 Ky. Law Rep. 1010. In those cases the person assaulted, Mary Gladder, had no relatives whatever in the county of Logan; she nor her father had ever been in that county until the day of the commission of the crime. The distinction between the cases just cited and the one at bar is apparent.

But counsel for the commonwealth contend that, even if the circuit court did err in overruling appellant's motion for a change of venue, the error was corrected by the order of the circuit court summoning a jury from Adair county to try appellant. This was done after an attempt had been made to get a jury from Taylor county. Failing to obtain even one juror, the court then ordered a jury from Adair county. In our opinion, under the peculiar and unusual circumstances of this case, that did not correct the error committed in refusing appellant the change of venue asked. It appears from the record before us that the summoning of the Adair county jury was irregular in itself. Without the knowledge of the trial court, or of the appellant, an important witness for the commonwealth summoned the jury from Adair. This witness was introduced on the trial for the purpose of supplying a motive on the part of the appellant for the killing, other than that already stated. Aside from the fact that the person summoning the jury was himself a witness against the accused, the jury could not help but notice the very bitter, antagonistic feeling that exhibited itself on various occasions in the very presence of the jury. The court room was filled by the friends and relatives of the

Digitized by Google

deceased, and their conduct was such as to indicate to the minds of the jury the feeling in Taylor county against the accused. The jury was lodged in the house of Mrs. Coffey, who, together with her daughter, were witnesses for the commonwealth, and against the accused, while the wife of the officer in charge of the jury was a near relative, a cousin, of both Joe A. Smith and his wife. While the record does not show, and we do not impute to either the officers or the ladies just mentioned, any intentional wrongful act, yet it must become at once apparent that, under all the circumstances, the trial jury was afforded unusual opportunities for learning of the extensive, bitter public sentiment against the accused, Shipp, all of which must have more or less influenced the trial jury to the prejudice of the defendant.

Appellant's counsel contend that the court erred in refusing to allow him to testify (and to allow him to prove the same by his son) that his wife confessed to him in the presence of the son on Saturday before the killing, her criminal intimacy with Joe A. Smith, the deceased. This identical question was before this court in the case of Shepherd v. Comth., 119 Ky. 931, 85 S. W. 191, 27 Ky. Law Rep. 376, where the court said: "The sole question here is whether the husband might show that he got his information from his wife. That he did so get it, for the purpose of this discussion, will be assumed. Having it, it is for the jury to say to what extent, if at all, it palliated his act. But, as shown in this record, that fact could not be brought to the knowledge of the jury except defendant proved, or some one else proved, that defendant had got such information. That he got it from his wife could take nothing from the sting of it. Its effect upon his mind and conduct must have been at least the same, if not, indeed, worse, than if it had been communicated by

Digitized by Google

some third person. If one is informed by his wife that she had been raped, or that a rape had been attempted upon her person, or that she had been grossly insulted and assaulted, pointing out the perpetrator of the act at the time, it would not be unnatural for the husband to act upon that information. To allow it to be proved that he acted drastically, without being permitted to show why, or upon what basis his belief rested, would be applying the rule for the protection of domestic felicity so as to make it hurt, instead of help, those for whose benefit it was primarily intended. We perceive no good reason for extending the rule invoked so as to exclude the evidence discussed. The court is of the opinion that the evidence should have been admitted to be weighed by the jury as other facts and circumstances in the case." Under this authority, it was error for the court to exclude the testimony offered, for it tended to show the motive and the state of mind of the accused at the time of the killing.

Appellant offered to prove by his son, Leslie, that he heard his mother confess her intimacy with the deceased. The court excluded this, and we think rightfully so, because it was not shown that this confession by Mrs. Shipp to Leslie was communicated to appellant prior to the killing of Smith, and for that reason it could have had no effect or influence upon the mind of appellant at the time of the homicide.

Notwithstanding the court's refusal to permit appellant to prove the confession of his wife to him in the presence of his son, the commonwealth was allowed to prove in rebuttal, by some 20 or 30 witnesses, the best citizens of the town and surrounding community, that Mrs. Shipp was a lady whose reputation for virtue and chastity was good, and above reproach. Of this appellant also complains. Counsel

Digitized by Google

for appellee contend that this testimony was properly admitted by the court to go before the jury for the purpose of showing that Mrs. Shipp was not guilty of the conduct ascribed to her, and, unless permitted to prove this, the commonwealth had no means of showing the charge made by the husband against his wife was false. This is the first time that this exact question has ever been before this court for decision, at least, we are unable to find any case in any State where this precise question has been passed upon, and no case has been cited in the briefs. We conclude, however, upon reason and authority analogous to the point in question, that the testimony of the wife's good character was incompetent, and the court should not have allowed it to go to the jury. The wife was neither a party to the action, nor a witness in the case; her reputation for chastity was not in issue.

In the case of Cowan v. Cowan 16 Colo. 335, 26 Pac. 934, a similar question was involved. In that case the court said: "The defendant was charged with having committed adultery with one ————, and counsel for appellant complains the court refused to allow them to inquire into the general reputation of said person for chastity. The argument is that, when the reputation for chastity of one is in evidence, it is competent to show such person's good reputation. This rule has no application under the circumstances of this case. The general reputation of the party with whom the adultery is alleged to have been committed was not in issue. She was neither a party to nor a witness in the case. The testimony was properly refused." A similar question was involved in the case of People v. Hurtado, 63 Cal. 288. There the wife of the defendant, under the law of that State, was allowed to testify that before the homicide she had confessed to her husband (the accused) that she had

Digitized by Google

committed adultery with the deceased. To corroborate this confession the accused offered to prove that the wife and deceased had together visited a disreputable house in the city. This evidence was rejected. In discussing the question thus raised, the supreme court said: "No direct evidence was offered by the people to contradict her statement that she had made the confession to her husband. We know of no principle which would permit the defendant to strengthen or bolster up the statement of the witness that she had declared to defendant that she had committed adultery, by proving that, in fact, she had committed adultery. Evidence that she had committed adultery would not tend to prove that she confessed to her husband she had committed adultery. It was her statement which would be claimed to be the cause, or one of the causes, which deprived defendant of his reason—not the truth of her statement with respect to which he had no personal knowledge. * * * To admit evidence in itself totally irrelevant, because it might, in some degree, render more probable testimony which is relevant, would be to open up the way to the trial of side issues, not made by the pleadings. If it were competent for the defense to give evidence tending to prove that defendant's wife had committed adultery, it would be competent for the prosecution in rebuttal to introduce witnesses who would swear that the house referred to was a house of good repute, or that defendant's wife never entered it. Moreover, it would have been incompetent for the prosecution, in the absence of evidence on the part of the defendant tending to prove her adultery, to cast discredit upon her testimony that she had confessed her guilt to her husband, by proving that she was entirely innocent. We are convinced the objection was properly sustained." The reasoning of

Digitized by Google

the court in that case applies here. The competency of the confession is based on the fact that it was the cause, or one of the causes, which induced the accused to act as he did. Its truth or falsity had nothing to do with his conduct. In that case the court said that, if it was competent to corroborate the confession, it would likewise be competent to contradict it. Thus a side issue would be presented for trial which might swallow up the principal one which the jury had been called to decide. In Johnson v. Commonwealth, 82 Ky. 116, 5 Ky. Law Rep. 877, the accused was informed that the deceased had whipped his brother. He immediately sought the deceased, and took his life. Evidence as to the facts of the whipping, offered by the accused, was held incompetent. If the reputation of the wife in this case was competent, substantive evidence of her innocence would also be admissible, and, if so, appellant would have the right, to corroborate by any fact or circumstance to corroborate the confession by showing her actual guilt. This would result in introducing side issues calculated to distract the minds of the jury from the real issues they were trying, and lead to confusion and uncertainty; in other words, rest the guilt or innocence of the accused upon the chastity or unchastity of his wife. So here, the fact that the wife, before and since the homicide (for the court allowed proof as to both periods), bore a good reputation does not disprove the fact that she made the confession to the appellant. And it was upon the confession of guilt, and not upon guilt in fact, that the appellant acted. In the case of Riggs v. Commonwealth, 103 Ky. 610, 45 S. W. 866, 20 Ky. Law Rep. 276, the accused on trial for murder was allowed to prove that the deceased had circulated a report that he was guilty of incest. The commonwealth was allowed to give evi-

Digitized by Google

dence of the truth of the charge. This was held reversible error by this court. So in Martin v. Commonwealth, 93 Ky. 192, 19 S. W. 580, 14 Ky. Law Rep. 95, the commonwealth was allowed to prove that Burks, the deceased, had procured an indictment against Martin for robbery, but it was held to be incompetent to show that the robbery had been, in fact, committed by Martin. In the case of Massie v. Commonwealth. 29 S. W. 871, 16 Ky. Law Rep. 792, it was held competent for the accused to prove the communication to him of slanderous aspersions, with reference to members of the family of accused, made by the deceased whom Massie thereafter sought and killed. But it was said to be wholly immaterial whether the charges were true or false, and, because the commonwealth was permitted to introduce proof conducing to show the truth of the charges, the judgment of conviction was reversed.

The commonwealth can break the force of this alleged confession: First, by showing that the wife did not make same, by showing that she was not at the place where the alleged confession was stated to have been made, or that the appellant and son were not there at the alleged time. Second, by impeaching the reputation of appellant and the son for truth and veracity. The attempt to show her general reputation for chastity was such that she would not likely have made such a confession involves a proposition that is new in the law of evidence. In Redus v. Burnett, 59 Tex. 582, a similar question arose. One Redus was sued in Texas on a judgment alleged to have been obtained in Mississippi on his accounts as executor. Redus defended in Texas, on the ground that he made no such settlement in Mississippi, or authorized any such settlement. The plain-

Digitized by Google

tiff showed that one Hooper, an attorney at law, represented Redus in making the settlement in Mississippi in which the judgment was rendered, and that Hooper was a man of high character, honest, etc. The court said: "The deceased was not a witness in the case, nor a party to the suit. His reputation was not in issue. The fact that he was a person of good or bad character was not relevant to any inquiry in the case, and a proper objection being raised to the question and answer, as irrelevant, the evidence should have been excluded." The evidence of the reputation of Mrs. Shipp was prejudicial to appellant, and was used with great force by employed counsel for the commonwealth in his argument to the jury, in which he said: "This great concourse of ladies and gentlemen have assembled here, not as a compliment to the speaker, but to attest, by their presence, the high regard in which Mrs. Shipp is held, and her good character." Although the court admonished the jury not to regard this statement of counsel, yet, coupled with the evidence of Mrs. Shipp's good character, it had the effect to impress upon the minds of the jury that, if they acquitted the accused upon the ground of irresponsibility, it was in effect an imputation of bad character to Mrs. Shipp, and that they had to convict the accused to sustain her good name.

Appellant's objections to the instructions of the court are, in the main, based upon an alleged error in No. 6, on the question of insanity. It appears that in No. 6, as copied in the original record, the clerk, by mistake, inserted the word "not," which materially changed the sense thereof, but has since been corrected by another and true copy of the instruction. The other instructions fairly presented the law of the case, with the exception of No. 2, on the subject of voluntary manslaughter, which reads as follows: "If

Digitized by Google

you believe from the evidence beyond a reasonable doubt that the defendant, James A. Shipp, did shoot and kill the deceased, Joe A. Smith, and further believe that said shooting and killing was done in sudden heat and passion, and without previous malice, you should find him guilty of manslaughter, and fix his punishment in the State penitentiary for a period of not less than 2 nor more than 21 years." To convict appellant under this instruction the jury had to believe that he shot and killed the deceased, and that the shooting and killing was done in sudden heat and passion, and without previous malice. The jury was not authorized to convict him, under this instruction, by the evidence introduced. It is true that the testimony tended to show that he was laboring under passion, but that passion was aroused several days before the killing, and the jury could not find that the killing was without previous malice. The instruction did not require the jury to find that the killing was willful and unlawful; it only required the jury to believe, beyond a reasonable doubt, that the killing was done while appellant was laboring under passion which was aroused previous to the time of the killing. This court has recently decided that it is not necessary, in such an instruction, to insert that the killing must be feloniously done. The court, in lieu of No. 2, should have given an instruction, in substance, that if the jury believed from the evidence, beyond a reasonable doubt, that the defendant, James A. Shipp, did willfully, and not in self-defense, shoot and kill Joe A. Smith, and that the shooting was done in sudden affray, or sudden heat and passion, and without previous malice, and under such provocation that was ordinarily calculated to excite passion beyond control, they should find him guilty of manslaughter,

Digitized by Google

and fix his punishment, etc. See case of Shepherd v. Commonwealth, supra.

The fourth and last assignment of error, presented by appellant's counsel, is that of the misconduct of employed counsel for the commonwealth during the trial. While it is true that the court sustained appellant's objections, in every instance, during the trial, to improper questions, they were repeated so often they must necessarily have left an impression upon the minds of the jury hurtful to appellant. This conduct of counsel was reprehensible, and the court should not have permitted it. It would be tedious, and is unnecessary, to cite and comment upon all this prejudicial matter, but we will give a few instances which will illustrate his offenses. When the appellant was being cross-examined, by this counsel, these questions were asked him, to-wit: "Q. You say you didn't want to have trouble with anybody? A. Yes, sir. Q. You have killed one man before this, have you not?" This court has often said that it was error to undertake to impeach a defendant or witness in this manner. This was very hurtful to the appellant. These questions were asked Sanders, a witness for the defendant, by same counsel "Q. Did you ever have occasion to arrest him (referring to appellant), or to take him home, or to get him to leave town? A. No, sir, I never did. Q. Were you here at the time he got into trouble with Coakley?" These questions were very improper, for the reason stated. He asked Patterson, a witness for the defense: "Are you the same man that testified on the motion for a change of venue that 14 generations of the Shipp family had died with their boots on?" This was an effort to show by indirection that public sentiment was strongly against appellant in the county, and that not only Shipp, but his ancestors, were lawless and desperate men.

Digitized by Google

Under the Constitution and laws of this State, appellant was entitled to a fair and impartial trial of the charge against him, and, from the record before us, we think this was not accorded him.

For these reasons, the judgment of the lower court is reversed, and cause remanded for further proceedings consistent with this opinion.

Whole court sitting.

CASE 85.—ACTION BY MAUDE WALTERS AGAINST THE WOODMEN OF THE WORLD ON AN INSURANCE CERTIFICATE ON THE LIFE OF HER HUSBAND.—February 21.

Woodmen of the World v. Walters

Appeal from Fulton Circuit Court.

R. J. BUGG, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Insurance—Life Policy—Conditions—Violation of Law—Self-Defense.—Where insured shot and killed Spinks in self-defense, and was also shot and killed by Spinks, insured did not die in consequense of a violation or attempted violation of the laws of the State or of the United States, within a benefit certificate precluding a recovery under such circumstances.
2. Appeal—Review—Verdict—Evidence.—The Court of Appeals will not interfere with the verdict of a properly instructed jury, unless it is flagrantly against the evidence.

HERSHEL T. SMITH and BROME & BURNETT for appellant.

LEE & HESTER for appellee.

Digitized by Google

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

Joel Q. Walters, the husband of appellee, was a member of appellant, the Woodmen of the World, a life insurance company, and under the terms of his membership was entitled at the time of his death to $750. In the certificate issued to him, it was provided that: "If the member holding this certificate shall be convicted of a felony, or shall be expelled from the order, or becomes so far intemperate, or use opiates, cocaine, chloral, or other narcotic poisons to such an extent as to impair his health,, or to produce delirium tremens, or should die in consequence of a duel or in consequence of the violation or attempted violation of the laws of the State, or of the United States, this certificate shall be null and void and of no effect, and all moneys which shall have been paid, and all rights and benefits which have accrued on account of this certificate shall be absolutely forfeited without notice or service." In an action by appellee, the beneficiary in the certificate of membership issued to Walters by appellant, it interposed as a defense the plea that Walters died "in consequence of a duel, or in consequence of the violation, or attempted violation, of the laws of the State," and on these grounds sought to avoid the payment of the amount due on the certificate. A trial was had before a jury, resulting in a verdict and judgment in favor of appellee for the full amount claimed, to reverse which this appeal is prosecuted.

The death of Walters occurred as the result of a quarrel, in which he engaged with his brother-in-law, J. W. Spinks, who was killed by Walters. This awful tragedy took place in the house in which Walters and

Digitized by Google

Spinks and their families were living at the time, and the only eyewitnesses competent to testify were their wives and a colored servant girl. The evidence as to who commenced the difficulty and fired the first shot is somewhat conflicting. The substance of the facts detailed by the witnesses are as follows: Walters had been absent from home for a few days, and, upon his return, went into the room occupied by Spinks and his family, where his wife was. The wife of Spinks was sick in bed at the time, and his little baby was in the room in a dying condition. Walters only remained for a few moments, making some inquiry about the condition of the baby and the wife of Spinks, and then he and his wife went into the dining room. In a short while Walters and his wife came back to Spinks' room; Walters carrying his baby in his arms. A few words—not of serious import—passed between Spinks and Walters, and immediately the shooting commenced, and in a few moments both of the men were lying dead in the hall adjacent to the room. On the evening of the tragedy, and shortly before it occurred, Spinks took his pistol out of the drawer in which it was kept, went out of the room, and snapped it several times. The evidence leaves the impression that Spinks was the aggressor, and started towards Walters, firing the first shot before Walters returned the fire. If Walters was the aggressor, or commenced the difficulty, his death would have been due to a violation of the laws of the State, and conseequently appellant would not be liable on the certificate issued to him; and so, if Walters' death was the result of a duel or mutual combat engaged in between himself and Spinks. On the contrary, if Spinks was the aggressor, and first attacked Walters, Walters had the right to defend and protect himself from the assault, using such means as were necessary, or reasonably

Digitized by Google

appeared to him to have been necessary, for that purpose, and his conduct would not be a violation of the conditions in the certificate. There is not sufficient evidence to support the theory that Walters' death was the result of a duel, or a voluntary combat engaged in between him and Spinks. The real, in fact only question in the case is: Was Walters, at the time he was killed, acting in his self-defense, or was he the aggressor or in fault in the difficulty that ended in his death?

This being the issue in the case, the trial judge instructed the jury as follows:

"The court instructs the jury to find for plaintiff the sum of $750, unless you believe from the evidence that the death of Joel Q. Walters was the result of a duel entered into between himself and J. W. Spinks, and that said Walters voluntarily entered into and engaged in said duel with said Spinks, or unless you believe from the evidence that the proximate cause of the death of said Walters was in consequence of the violation, or attempted violation, of the laws of this commonwealth, in taking or attempting to take the life of J. W. Spinks, or of inflicting great bodily harm upon him, or of provoking said Spinks to attack him by hostile words or demonstrations. Then, and in any of such events, the law is for the defendant, and you could so find."

"The court instructs the jury that if, at the time Walters and Spinks engaged in the combat which resulted in shooting each other, the decedent, Walters, was in danger of losing his life or of suffering great bodily harm at the hands of Spinks, or he had reasonable grounds for believing, and did in good faith believe, that his life was in danger, or in danger of suffering great bodily harm at the hands of Spinks, and that said Walters used no more force than was

Digitized by Google

necessary, or seemed to him to be necessary in the use of a reasonable discretion, to rid himself of the danger to him, which was real, or to him appeared to be real, or reasonably apparent, then the law is for the plaintiff, and you will so find, although you may believe that the death of Joel Q. Walters was the result of his attempt to kill Spinks, unless you should further find from the evidence that the decedent, Walters, began the difficulty which led up to the shooting, and was the active, proximate cause of the attack upon himself by Spinks, in which latter event the law is for the defendant, and you should so find, although you may believe that at the time Walters shot Spinks he acted in self-defense, as laid down in the first part of this instruction."

These instructions in some of the language used are inaccurate; but, upon the whole, they presented fairly to the jury the issue between the parties. The rule is too well established to need citation of authority that this court will not interfere with the verdict of a properly instructed jury, unless it is flagrantly against the evidence and it cannot be said that the verdict returned is unsupported by evidence. It is true that the testimony is meager and unsatisfactory; but the weight of it tends to support the theory that Spinks, and not Walters, was the aggressor, and that, although Walters killed Spinks, he believed that Spinks was then about to take his life, or inflict upon him great bodily harm.

It is not a violation or attempted violation of the laws of the State for a man in defense of his own life to take the life of another, and the person who thus slays his adversary will be excused, if he believed, or had reasonable grounds to believe, that the danger to himself was real, or in the exercise of a reasonable judgment appeared to him to

Digitized by Google

have been real, whether it was or not. It is not true, as a matter of law, that it is a violation of the laws of this commonwealth to take the life, or attempt to take the life, of any human being, as cases unfortunately arise in which it becomes necessary to take human life in defense of one's own person. The provision in the certificate is a reasonable and proper one, and it should be fairly interpreted, as it accomplishes the double purpose of protecting the company and exercising a restraining influence upon the members, who know that if they engage in violations of the law they will forfeit their rights to insurance under the policy or certificate.

Under the facts of this case as exhibited by the record, and in the face of the verdict returned by the jury, we do not feel warranted in holding that either a peremptory instruction should have been given on behalf of appellant, or that there is in the record any error prejudicial to its substantial rights.

Wherefore the judgment of the lower court is affirmed.

Digitized by Google

CASE 86.—FORCIBLE DETAINER PROCEEDING BY MARY L. ROSE AGAINST R. R. RICH.—February 21.

Rich v. Rose

Appeal from Kenton Circuit Court.

W. McD. SHAW, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Landlord and Tenant—Collection of Rent—Notice to Vacate—Right to Eject Tenant—Waiver.—The acceptance or enforced collection of rent in arrears at the time notice to vacate the premises is given, will not deprive the landlord of the right to eject the tenant. And without waiving his right he may also after forcible detainer proceedings have been instituted, collect or accept the rent that accrued between the date of the notice to vacate, and the issual of the writ, if under the statute, or contract, a certain number of days must elapse, after giving notice, before forcible detainer proceedings can be instituted.
2. Same—Forfeiture of Lease—Waiver.—But if a landlord accepts or undertakes to collect rent not due, when notice to vacate is given, and that does not accrue between the date of the notice and the issual of the writ, or rent that becomes due after forcible detainer proceedings have been instituted, he will waive his right to forfeit his lease under the notice, as the acceptance of the rent or the attempt to collect it is a recognition of the right of the tenant to occupy the premises, and a waiver of the forfeiture.

RICHARD H. GRAY for appellant.

1. We submit that appellants plea of estoppel should have been sustained and a judgment for him should have been entered by the court below. (Masonic Savings Bank v. Ronald's Executor, 1 Ky. Law Rep., 273; Rhodes v. Rhodes, 18 Ky. Law Rep., 916; Hill v. Spaulding, 21 Ky. Ky. Law Rep., 1383; Morehead v. Morehead, 16 Ky. Law Rep, 34.)

Digitized by Google

2. A party cannot take two inconsistent positions.

3. A cause of forfeiture in a lease may be waived. (Johnson v. Whittlemore, 27 Mich., 466; Wheeler & W. Mfg. Co. v. Teetzlof, 53 Wis., 220; Deyon v. Jamison, 33 Mich., 94.)

FURBER & JACKSON, attorneys for appellee.

SUMMARY.

1. After suit is brought it is not a question of waiving forfeiture—but one of abandoning her suit.

2. The allegations of the petition and the terms and effect of the judgment of October 28, 1904, were not of such a character as to amount to a final judgment regarding the year's rent. It adjudged nothing regarding the year's rent upon its merits, it merely holds all up as security to await further pleading at the end of the year or end of the tenancy, and then apply sufficient to pay any which may then be shown to be owing. There is in it neither certainty nor finality.

3. If the allegations of the petition and terms and effect of the judgment were of the character claimed by defendant, they do not operate to estop the plainiff from proceeding in this case. Defendant has introduced no proof to show that he was led by reason of the character of the petition and judgment to believe that plaintiff intended to abandon her forcible detainer suit, and that relying upon that abandonment, he had acted—made changes in his affairs because thereof; that he has been or will be injured because of those changes if plaintiff be permitted to further prosecute this forcible detainer case.

These things are essential to an estoppel. But defendant has proven none of these things. As to the estoppel the burden is on the defendant, and defendant has not proven that a single one of these essentials exist, whereas his testimony must show all.

4. The right of entry for forfeiture was open to plaintiff. She elected to forfeit. She made final her election by instituting this suit. She was, and is, entitled to proceed with this suit, unless since its institution she has

(a) For a consideration agreed to abandon it, or she has

(b) done something which has deceived the defendant into the belief that she had abandoned it, and that he so believing acts on it and cannot now save himself from loss caused or threatened if she be permitted to proceed, and so she should be estopped.

Digitized by Google

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

This appeal is prosecuted from a judgment of the Kenton circuit court holding appellant guilty of forcible detainer. It appears that on December 15, 1903, appellant executed to appellee a note for $1.600, payable in monthly installments of $25 each, beginning on January 1, 1904; the contract providing that, if appellant failed to make any of the payments within 30 days after the same became due and payable, then the whole amount of the debt became due and payable at the option of the appellee. To secure the payment of this obligation appellant executed a mortgage upon a number of articles of personal property. Simultaneously with the execution of this contract appellee leased to appellant for the term of one year, with the privilege of extension from year to year for five years, the premises in which the business of appellant was carried on, and in which the articles mortgaged were situated; appellant agreeing to pay as rent $37 per month, payable at the end of each month. The rent contract provided that, in default of any installment of rent, the lessor, appellee, should have the right to determine the lease and take possession of the premises. On June 16, 1904, appellee gave to appellant a notice informing him that he had been for more than 30 days in default in the payment of the installments due under the contract, and also in the payment of the rent, and that she elected to declare the whole indebtedness mentioned in the contract due and payable, and to declare the lease forfeited and terminated by reason thereof. On July 7, 1904, appellee instituted this forcible detainer proceeding in a magistrate's court, and on October 31, 1904, appellant

Digitized by Google

was found guilty, and a judgment of restitution awarded. This judgment was traversed, and upon a trial of the traverse in the circuit court in February, 1906, appellant was again found guilty. On August 15, 1904, appellee collected $142 on a distress warrant issued August 2, 1904, and on September 9, 1904, appellant paid to appellee $37 rent. The rent collected on the distress warrant and that paid by appellant satisfied the rent due to August 15, 1904. On July 18, 1904, appellee brought suit on the $1,600 contract, asking judgment for the amount due, and the enforcement of her mortgage lien upon the property to secure its payment. In her petition she set up the rent contract, and averred that she had a landlord's lien upon all the personal property on the leased premises, being the same property covered by the mortgage, to secure one year's rent due and to become due, and that there was due at that time rent amounting to $103. She prayed judgment for the amount due under the contract, also for the rent due and to become due within a year, amounting to $444, and for a sale of the property to satisfy, first, the rent claims; second, a mortgage to Glesenkamp; and, third, her mortgage lien. On October 10, 1904, appellee filed an amended petition, setting up the fact that since the institution of the suit she had collected $142 and $37 rent, which paid the rent to August 15, 1904, and that there was due and unpaid the installment of rent due September 15, 1904. On October 28, 1904, judgment was rendered in favor of appellee for the amount due on the mortgage debt, and it was further adjudged that appellee had a landlord's lien for rent upon the mortgaged property which was upon the leased premises to secure the payment of 12 months' rent at $37 per month from August 15, 1904, and it was ordered that the mortgaged property be

Digitized by Google

sold, and the proceeds applied, first, to pay the lien of Glesenkamp; second, to pay the rent for one year; and, third, the mortgage debt. On November 8, 1905, an order was made directing the master commissioner cut of the proceeds of the sale of the mortgaged property to pay the lien of Glesenkamp, then to appellee $444, being one year's rent from September 15, 1904, to September 15, 1905, and the balance in his hands to appellee on her mortgage debt. On January 3, 1906, appellee moved the court to modify the order of distribution in so far as it directed the payment of $444 rent before paying the mortgage debt. so that the mortgage debt should be paid in full before anything was paid upon the rent claim. This motion the court overruled.

The above statement of facts is necessary to an understanding of the question presented by appellant, who on December 15, 1905, as a defense to the forcible detainer proceedings, pleaded as an estoppel against appellee's right to further prosecute the forcible detainer, the steps taken by her in the civil action, and the judgment rendered in said action in October, 1904, directing that out of the proceeds of the property on the leased premises there should be paid her rent for the year between September 15, 1904, and September 15, 1905. Whether or not this plea presented a good defense to the forcible detainer proceeding is the only question at issue. The trial judge held that it did not, resting his conclusion upon the ground that appellee did not intend, when she instituted the suit on the mortgage debt, to abandon or in any way limit her right to prosecute the forcible detainer proceeding, and that appellant was not induced by anything appellee did to believe that she intended to abandon the forcible detainer proceeding,

Digitized by Google

and that he did not so believe, nor was he induced because of any such belief to take any action, or do anything than otherwise he would not have done.

We are of opinion that the lower court erred in its conclusions of law. In June, 1904, appellant, by reason of his default in the payment of rent due, forfeited his right to the premises at the election of appellee, and, following up her right to enforce the forfeiture, she instituted the forcible detainer proceeding in July. In October appellant was found guilty, and judgment of restitution rendered, which was traversed in three days thereafter. When the finding of guilty in the country was traversed, appellant, under section 463 of the Civil Code of Practice, executed a traverse bond, with sufficient surety, conditioned that he pay to appellee damages for withholding the possession of the property during the pendency of the traverse, as well as reasonable expenses of the traverse in defending it. So that, upon the execution of this bond in October, 1904, appellee was fully protected in the rent during the occupancy of the premises by appellant pending the traverse, but we do not deem this material to the consideration of the question. We have, then, this condition of affairs: Appellee, although relying upon appellant's forfeiture of his right to occupy the premises, and seeking by forcible detainer proceedings to eject him, pending the trial of the forcible detainer case, on July 18, 1904, instituted her civil action, in which she sought to recover one year's rent, and in the judgment rendered in the action was awarded the full rent for one year ending in September, 1905, and a lien upon the property of appellant to secure it. In one proceeding she was seeking to deprive him of the premises and take possession of them herself, and in another was prose-

Digitized by Google

cuting an action against him for rent that would not be due for nearly a year thereafter. It seems to us that appellee could not at the same time prosecute these two actions, seeking radically inconsistent relief. She had the right to either remedy—the right to prosecute the forcible detainer proceeding, or the right to waive the forfeiture and permit appellant to occupy the premises, and recover her rent from him—but it would be manifestly unreasonable and unfair to permit a landlord to resort to both at the same time. The acceptance or enforced collectionof rent in arrears at the time notice to vacate the premises is given will not deprive the landlord of the right to eject the tenant under the notice. And without waiving his right he may also after forcible detainer proceedings have been instituted collect or accept the rent that accrued between the date of the notice to vacate and the issual of the writ, if under the statute or the contract a certain number of days must elapse after giving notice before forcible detainer proceedings can be instituted. The rights of landlords are very fully protected by statute, and the writ of forcible detainer affords a speedy and simple remedy for the recovery of leased premises from a delinquent tenant. In fact, we may add that landlords are favorites of the law, and are given extraordinary remedies for the protection of their rights. But, if the landlord accepts, or undertakes to collect, rent not due when notice to vacate is given, and that does not accrue between the date of the notice and the issual of the writ, or rent that becomes due after forcible detainer proceedings have been instituted, he will waive his right to forfeit the lease under the notice, as the acceptance of the rent or the attempt to collect it is a recognition of the right of the tenant to occupy the premises and a waiver of the forfeiture. Taylor

Digitized by Google

on Landlord and Tenant, secs. 485, 497, 499. In American and English Encyclopedia of Law, vol. 18, p. 382, it is said: "It may be stated as a general rule that where the lessor after knowledge of the breach of any covenant or condition for which he could enforce a forfeiture, expressly or impliedly recognizes the continuance of the tenancy, he thereby, waives the forfeiture, and is afterwards precluded from asserting it. * * * The question whether the landlord intended to waive the forfeiture is not material. Where his act amounts to a waiver of the forfeiture, or a recognition of the continuance of the tenancy, he is precluded from asserting that it was not his intention to waive the forfeiture. Thus, the receipt of subsequent rents is held to constitute a waiver, though the landlord expressly states at the time of such receipt that he does not intend to prejudice his right to assert the forfeiture." Collins v. Canty, 6 Cush., (Mass.) 415; Gomber v. Hackett (Wis.) 70 Am. Dec., 467; Garnhart v. Finney (Mo.) 93 Am. Dec., 303. In the case before us appellee, in addition to the suit to recover the rent within the year, and after she had given notice to the tenant to vacate the premises, and had instituted forcible detainer proceedings against him, accepted rent from him up to August 15, 1904; so that appellee not only waived her right to prosecute the forcible detainer proceedings by the institution of the civil suit to collect the rent, but by the acceptance of rent that accrued after the writ of forcible detainer had issued.

We therefore conclude that the plea of estoppel interposed by appellant was a bar to the prosecution of the forcible detainer proceedings. Wherefore, the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

Digitized by Google

CASE 87.—ACTION BY THE FARMERS' HOME INSURANCE COMPANY AGAINST J. W. ACTON TO RECOVER CERTAIN CALLS AND ASSESSMENTS ALLEGED TO BE DUE.—February 21.

124 677
f130 607

Acton v. Farmers' Home Insurance Co.

Appeal from Lincoln Circuit Court.

W. C. BELL, Circuit Judge.

From an order overruling a demurrer to the petition defendant appeals. Reversed.

1. Insurance—Mutual Companies—Assessments—Actions—Petition.—A petition in an action by an insurance company organized under Ky. Stats., 1903, c. 32, subd. 5 (sections 702-722), to recover from a delinquent policy holder the amount of any assessment due, which does not aver the amount of the assessment, the necessity and purpose of it, and when and by whom it was made, is insufficient.
2. Same—Assessments—Notice—Tender of Policy for Cancellation.—Ky. Stats., 1903, section 711, relating to insurance companies provides that the secretary shall, within 30 days after any assessment has been made, notify every member of the corporation by written notice, stating the amount due the corporation from the members, the time when, and to whom, it shall be paid, and the use to be made of the money collected. Held, that this does not require notice to a member who tenders his policy for cancellation.

P. M. McROBERTS and H. HELM, attorneys for appellant.

QUESTION OF LAW INVOLVED.

The provisions of the Statutes, or charter, are conditions precedent to the right of recovery by appellee (an assessment insurance company), of an assessment against appellant, and the petition, failing to show that any assessment had ever been made by its board of directors, or executive committee, or that it had

Digitized by Google

complied with any one of the provisions of sections 709 and 711, Ky. Stats., stated no cause of action, and should have been dismissed.

RAWLINGS & VORIS, attorneys for appellee.

AUTHORITIES CITED.

Ky. Statutes, secs. 702, 707, 708, 709, 710, 711, 712, 716; Moore v. Bates, 2 Ky. Law Rep., 256.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

The principal question involved is the sufficiency of the petition to which a demurrer was entered and overruled. It is alleged that the appellee, plaintiff below, was organized under the provisions of subdivision 5, c. 32, of the Kentucky Statutes of 1903, embracing sections 702 to 722, inclusive, for the purpose of conducting a fire insurance company in certain named counties in Kentucky; that it issued to appellant, defendant below, in May, 1900, a policy of insurance, indemnifying him against loss by fire, wind, or lightning to his property; that in August, 1903, appellant returned his policy for cancellation, and notified the company of his intention of withdrawing from it; that "section 20 of the by-laws, which by-laws are made a part of the contract of membership, provides that any member of this company may withdraw at any time, giving the company thirty days' notice and surrendering his policy and paying his pro rata of all claims against the company at that time. Plaintiff states that it is provided in said by-laws and contract that it shall be the duty of the executive committee of the company to make calls or assessments each year, one on the third Tuesday of each January and one on the third Tuesday of July of each year, the call to be on the basis of thirty

Digitized by Google

cents on each hundred dollars of insurance. And that, by and under the terms and conditions of the contract and by-laws, the defendant, upon becoming a member of the company, became and was liable for each of such assessments and calls so long as he remained a member thereof. Plaintiff states that the defendant surrendered his policy and it was canceled on the date aforesaid, and at the time of the cancellation of the policy and the withdrawal of the defendant from the company there was due and owing by him for the proportionate part of the July, 1903, call the sum of 71 cents, and that he has failed and refused to pay the same or any part thereof, although payment has been demanded. Plaintiff states that the defendant has also failed and refused to pay his pro rata of the claims against the company at the time of his withdrawal from same and cancellation of his policy, which amounted to $14.10, and he is justly indebted to it in said amount, demand for which had been made and payment refused. It states that section 712 of the Ky. Stats., 1903, provides that an action may be brought by the company against any member thereof to recover all calls or assessments made by the company, and that, if the company is compelled to bring any suit to collect said call or assessment, it may recover the same with fifty per cent. thereof to be added as a penalty, for the refusal to pay within the time required. It states that the defendant has failed and refused to pay the assessments and pro rata of the claims against the company within the time required or at all, and that it has been compelled to bring this suit to collect the same, and the penalty amounts to $7.40." It further set up its lien upon the property insured, and asked for judgment for $23.23, the amount of principal, interest, and penalty. Judgment was rendered against appellant for the

Digitized by Google

amount claimed, less the penalty, and a lien was adjudged upon the property, covered by the insurance to secure the payment of the judgment.

Section 709 of the Ky. Stats., 1903, provides that: "should the amount of any loss or damage exceed the amount of money on hand such of its officers as may be authorized by the by-laws to do so shall convene the directors or executive committee, who may borrow money on the credit of the corporation sufficient to pay the loss, but no more, or make an assessment upon all the property, issued pro rata according to its classification, and according to the amount insured, sufficient to pay what the cash in hand falls short of paying, or for the whole loss or damages, as the directors or executive committee may decide to be for the best interest of the corporation. If the directors or executive committee deem it to be for the best interests of the corporation, they may, with the authority of a majority in value of the insurance held by members of the corporation, conferred by resolution, by-law or otherwise previously given, make an estimate of such sums as in their judgment will be necessary to pay all losses, damages and expenses for the current year, and supply any deficiency in the preceding year, and proceed to assess, levy and collect the same of the members of the corporation, at such times, as, in their discretion, will be most advantageous to the corporation. * * * Not more than one such general assessment shall be made in any one year, nor shall any such assessment be made if more than ten per cent. of any previous assessment shall be in the treasury of the corporation, and not at the time required for losses actually suffered." Section 711 that: "the secretary shall within thirty days after any assessment has been made, notify every member of the corporation by written or printed notices

Digitized by Google

signed by him, stating the amount due the corporation from the members, the time when, and to whom, it shall be paid, and the use to be made of the money collected." Section 718 that: "every such corporation may make and enforce such by-laws not inconsistent with the laws of this State, nor those of the United States, by a vote of two-thirds of the directors at any meeting." The by-laws adopted by appellant provide, in section 13, that: "It shall be the duty of the executive committee to make two calls or assessments each year. One on the third Tuesday of January, and one on the third Tuesday of July of each year. The call to be on a basis of thirty cents on each one hundred dollars of insurance. The money so collected to be used for losses, expenses and to restore the reserve fund. Such call shall be made in whole or in part only when needed to pay losses or to restore the reserve fund." Under section 709 the directors or executive committee may borrow money on the credit of the corporation sufficient to pay any loss or may make an assessment upon all of the property sufficient to pay what the cash on hand falls short of paying, or for the whole loss or damage, in their discretion. They may also, under authority of this section, and with the assent of the requisite number of policy holders, make an estimate of such sums as in their judgment, will be necessary to pay all losses, damages, and expenses for the current year, as well as supply any deficiency in the preceding year. Under this section the directors or executive committee may make a single assessment to pay a loss or part of a loss, or a general assessment to cover generally losses, damages, and expenses, and supply deficiencies in the preceding year. The special assessments to defray a loss may be made at any time, but only one general assessment can be made in any

Digitized by Google

one year. The only authority to the corporation to make asessments is found in this section. and, in making assessments, the corporation is limited to the powers granted it. We find no authority in the statutes giving corporations of this character the right to make two assessments each year, unless they are necessary to pay losses. Therefore, the corporation had no power to enact section 13 of the by-laws, or to make two calls or assessments each year as therein provided. By-laws may be enacted by the corporation, prescribing in detail the duties, powers, and compensation of officers, and the mode and manner of making assessments, and relating to such other matters as may be necessary to direct and control the affairs of the corporation, but no by-law can be adopted in conflict with the statutes, nor can any by-law be enacted investing the corporation with authority to make larger assessments than those authorized by the statute, or assessments for purposes not therein designated. When it is sought to recover from a delinquent policy holder the amount of any assessment due, it is a condition precedent to the recovery that the corporation shall have complied with the statute in making the assessment, and therefore the petition should aver the amount of the assessment, the necessity and purpose of it, and when and by whom it was made, so that the policy holder may be informed of the exact nature of the demand against him, and make an issue concerning it if he desires. The petition in this respect is not sufficient. It merely avers the authority to make the assessment, but does not state in terms that the assessments were ever made, nor that they were necessary to pay losses, supply deficiencies, defray expenses, or repay borbowed money, or the other essential facts necessary to constitute a cause of action. The allegations that

Digitized by Google

"there was justly due and owing by him to the company for the proportionate part of July, 1903, call the sum of 71 cents," and that "he was justly indebted to it in the sum of $14.10," are mere conclusions of the pleader. American Mutual Aid Soc. v. Hellburn, 85 Ky., 1, 2 S. W., 495, 8 Ky. Law Rep., 627, 7 Am. St. Rep., 571.

We do not think it necessary that the company shall give to a member who tenders his policy for concellation the 30 days' notice of the assessment provided for in section 711. This notice is designed for the benefit of persons who continue to be members of the corporation. When a member, as authorized in section 716, desires to withdraw from the corporation, he may do so by surrendering his policy and paying his share of the claims against the corporation. And all that is required of the corporation is that it shall inform him at the time he asks to withdraw of the amount due by him. The officers of these corporations are invested with discretionary powers in the assessment of policy holders, and this discretion should be exercised strictly within the limits of the statute, and when an assessment is made, the policy holder is entitled to know the reason and necessity for it, and that it was made by the proper officers.

The demurrer to the petition should have been sustained. Wherefore the judgment is reversed for proceedings not inconsistent with this opinion.

Digitized by Google

CASE 88.—ACTION BY ALICE WESTCOTT, ADMINISTRATRIX OF EDWARD WESTCOTT, DECEASED, AGAINST THE CITIZENS' TELEPHONE CO., FOR CAUSING THE DEATH OF HER INTESTATE.—February 21.

Citizens' Telephone Co. v. Westcott's Admx.

Appeal from Campbell Circuit Court.

A. S. BERRY, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Electricity—Contributory Negligence—Knowledge of Danger. —Where deceased knew of and deliberately placed himself in position to receive an electric current, though its existence was due to defendant's negligence, there can be no recovery.
2. Same—Trial—Instructions.—The uncontradicted testimony that deceased was told that a telephone wire crossed an electric light wire; that he saw sparks flying from the telephone box; that he touched the box at various times with his fingers, and with a wire, causing it to emit sparks; that he placed his hand upon the box and received the shock that killed him—is sufficient to require a peremptory instruction to the jury to find for defendant.

THOS. P. CAROTHERS, attorney for appellant.

SUMMARY.

This appellant believes that it should have a reversal of this cause—

1. Because, the trial court refused to set aside the swearing of the jury after its minds had been prejudiced by the statement of counsel for plaintiff that the decedent had left a widow and six small children, "the youngest one a baby out there in arms."

2. Because, the trial court permitted the widow of intestate to testify as to the children the intestate left.

Digitized by Google

3. Because, there was no proof of intestate's power to earn money.

4. Because, the proof does not justify the measures of damages by the instruction for same.

5. Because, the intestate is clearly shown to have contributed to his own death by his own acts and unless he had so acted his death would not have occurred.

6. Because, the damages are excessive and show plainly that from all the facts and from all the occurrences at the trial the jury was influenced by passion and prejudice.

7. Because, the co-defendant by the proof was, if appellant was guilty of negligence, equally as guilty, and the fact that the jury found against one only, a self-evident fact that passion and preju dice influenced the jury.

8. Because, the wire of appellant was interfered with, moved and changed without appellant's knowledge or consent and at a time so shortly before the accident that it could not by the utmost care have known it.

9. Because, the instructions of the court are not the law in the case.

AUTHORITIES CITED.

Standard Oil Company v. Tierney, 92 Ky., 369; Louisville & Nashville R. R. Co. v. Shumaker's Adm'r, 21 Ky. Law Rep., 803; L. & N. Ry. Co. v. Eakin's Adm'r, 20 Ky. Law Rep., 819; City of Chicago v. O'Brennan, 65 Illinois, 163; L. & N. Co. v. Fox's Adm'r, 20 Ky. Law Rep., 81; L. & N. R. R. Co. v. Mulfinger's Adm'x, 26 Ky. Law Rep., 3; Buey's Adm'x v. Chess & Wymond, 27 Ky. Law Rep., 198; Carey v. Samuels & Co., 28 Ky. Law Rep., 6; City of Owensboro v. York's Adm'r, 25 Ky. Law Rep., 1397 and 1439; L. & N. R. R. Co. v. Berry's Adm'x, 96 Kentucky, 604; L. & N. R. R. Co. v. Long, &c., 94 Kentucky, 410; L. & N. R. R. Co. v. Creighton, 20 Ky. Law Rep., 169; Board of Internal Improvement for Lincoln County v. Morris' Adm'r, 23 Ky Law Rep., 1885; Illinois Central R. R. Co. v. Watson's Adm'r 25 Ky. Law Rep. 1360.

GREENE & VANWINKLE for appellee.

THOS. L. MICHIE and PHILIP of counsel.

POINTS AND AUTHORITIES CITED.

"Res ipsa loquitur." (Delahunt v. United Telephone and Telegraph Co., 64 Atlant., 515.)

Digitized by Google

1. Utmost pains commensurate with danger. (Lewis' Adm'r v. Louisville Electric Light Co., 30 S. W., 992, 21 Ky. Law Rep., 34; Macon v. Paducah Street Ry. Co., 62 S. W., 496, 23 Ky. Law Rep., 46; Thomas' Adm'r v. Gas Company, 56 S. W., 153, 21 Ky. Law Rep., 1690; Crosswel on Electricity, chap. 17, sections 383 to 395.)

2. Where accident occurs there is a prima facie case. (City Electric Railway Company v. Conery, 31 L. R. A., 570; McKay v. Southern Bell Telephone Company, 31 L. R. A., 589; Western Union Telegraph Company v. Nelson, 31 L. R. A., 572; Ashland Coal Company v. Wallace's Adm'r, 42 S. W., 742, 19 Ky. Law Rep., 1028; Haynes v. Raleigh Gas Company, 114 N. C., 203, 26 L. R. A., 810; Henning v. Western Union Telegraph Company, 41 Fed., 864; Ahern v. Oregon Tel. Co., 24 Ore., 276, 22 L. R. A., 635; Western Union Telegraph Company v. Thorn, 22 L. R. A., 635, 64 Fed., 287.)

3. Contributory Negligence. (East Tenn Telephone Company v. Simm's Adm'r, 36 S. W., 171; Southern Railroad Co. v. Goddard, 89 S. W., 677, 28 Ky. Law Rep., 523; Fugate v. City of Somerset, 29 S. W., 970, 16 Ky. Law Rep., 807; Finnegan v. Falls River Gas Company, 159 Mass., 211.)

4. Measure of Damages. (Louisville and Nashville Ry. Co. v. Shumaker's Adm'r, 21 Ky. Law Rep., 803; Louisville and Nashville Ry. Co. v. Eakin's Adm'r, 20 Ky Law Rep., 742; Southern Ry. Co. v. Evan's Adm'r, 23 Ky. Law Rep., 568, 63 S. W., 445; Standard Oil Company v. Tierney, 92 Ky., 377.)

5. Evidence as to family. (Louisville and Nashville Ry. Co. v. Taafe's Adm'r, 50 S. W., 850, 25 Ky. Law Rep., 64; C. N. O. & T. P. Ry. Co. v. Sampson's Adm'r, 30 S. W., 14, 16 Ky. Law Rep., 819; Railroad v. Kelly's Adm'r, 38 S. W., 852, 18 Ky. Law Rep., 819.)

6. Evidence of gross neglect. Degree of negligence is a question for jury. (Louisville and Nashville Ry. Co. v. Mitchell, 87 Ky., 327, 8 S. W., 706; Needham v. Louisville and Nashville Ry. Co., 85 Ky., 423, 3 S. W., 797; C. N. O. & T. P. Co. v. Shelby, 85 Ky. Law Rep., 527; Greenwood v. McHenry Coal Co., 14 Ky. Law Rep., 336.)

7. Evidence of earning only an item for the consideration of jury. (Louisville and Nashville Ry. Co. v. Scott's Adm'r,, 56 S. W., 574, —— Ky. Law Rep., ——; Louisville and Nashville Ry. Co. v. Mullfinger's Admrx., 80 S. W. 502; Chesapeake and Ohio Ry. Co. v. Lang's Adm'r, 38 S. W., 504, 18 Ky. Law Rep., 794; Chesapeake and Ohio Ry. Co. v. Dupee, 68 S. W., 15, 24 Ky. Law Rep., 94.)

Digitized by Google

OPINION OF THE COURT BY JUDGE BARKER—Reversing.

This is an action instituted by Alice Westcott, as administratrix of Edward Westcott, deceased, to recover damages for the death of the deceased, who was her husband, from the effect of an electric shock received by him on August 21, 1905. The appellant, the Citizens' Telephone Company, and the Union Light, Heat & Power Company, both corporations doing business in Newport, Ky., were made defendants, and charged in the petition with having, by gross negligence, caused the death of Edward Westcott. Both defendants filed answers, controverting all the material allegations of the petition, and pleading contributory negligence on the part of the decedent. These affirmative allegations of the answer were controverted by reply, and the issues thus completed. A trial resulted in a verdict against the Citizens' Telephone Company for $15,000, and in favor of the Union Light, Heat & Power Company. From the judgment based upon this verdict this appeal is prosecuted.

The substantial facts are as follows: At the time of his death Edward Westcott was in the employ of the Chesapeake & Ohio Railway Company and the Louisville & Nashville Railroad Company as night gate operator, and was engaged at his business in the watchtower at the railroad crossing on Monmouth street, between Eleventh and Twelfth streets, in Newport, Ky. In the watchtower there was what is called in the record "a block signal telephone box," which is a part of a line of railroad telephone used by the above-mentioned railroad companies for their private business, but which is owned and operated by the

Digitized by Google

Citizens' Telephone Company. The telephone line had sagged down on John street until it rested upon the highly charged electric wire of the Union Light, Heat & Power Company, and had by this contact become itself dangerously charged with electricity, which it conveyed to the telephone box station in the watchtower. As soon as the dangerous current reached the telephone box it burned out the fuse and manifested itself by a buzzing sound and emitting sparks. This unusual condition of affairs attracted the attention of Westcott, who said to John Shaw, the telegraph operator, who was with him in the tower, that "the thing had a fit;" and he thereupon began a series of experiments, by placing his finger lightly against the box and withdrawing it quickly so as to make the sparks fly from the highly charged box. He also obtained a short piece of insulated wire, and, holding it by the insulated part, he placed the uninsulated ends to the box, making it emit a shower of sparks. This was begun in the early part of the evening, about dusk, and was continued at various times from then until about 2 o'clock, when he was killed. Early in the evening, the witnesses say about dusk, two young men, who saw that the telephone line was crossed with an electric wire on John street, came to the tower and informed the inmates, of whom Westcott was one, of the fact that the wires were crossed, and that the condition resulting therefrom was dangerous. Two policemen, who came into the watchtower during the night, before the accident, saw Westcott experimenting or playing with the charged box. Afterwards, as said before, he placed his hand upon the box in such manner as to receive a shock that caused his hand to involuntarily grip the box, and at the same time he was hurled to the floor, tearing

Digitized by Google

the box from its fastening on the wall, and killing him almost instantly.

Assuming for the purposes of this appeal that the crossing of the telephone with the electric wire was negligence on the part of the appellant company, is appellee, under the state of facts detailed above, entitled to recover damages for his death? The decedent was 34 years of age, and, so far as this record shows, was a man of at least ordinary intelligence, and his business indicates that he understood something of machinery and the simpler laws of natural physics. It is perfectly plain, from the uncontradicted testimony, that he was at the time of his death not engaged in any duty connected with the telephone box from which he received the fatal shock, but, on the contrary, knowing the abnormal condition with which he was confronted, he was, for his own amusement, experimenting with it as above indicated. The manner in which he made these experiments shows clearly that he appreciated the occult danger connected with his operations; and, in addition, he had been informed early in the evening that the cause of the box being charged was, that the telephone line was crossed with the electric wire, and that this condition was dangerous. John Shaw, the night operator, testified without contradiction that Westcott was present when John Scott and Irwin Zitt brought in the information that the lines were crossed on John street, and the dangerous condition resulting therefrom.

The question, then, arises: If all the evidence touching the cause of Edward Westcott's death shows without any sort of contradiction that he knew the dangerous condition of the telephone box, and so knowing, without any duty calling him thereto, he deliberately placed his hand on the highly charged

Digitized by Google

instrument, and received a shock which resulted in his death, can his personal representative recover damages? We think this question must be answered in the negative. In the case of City of Owensboro v. York's Adm'r, 117 Ky. 294, 77 S. W. 1130, 25 Ky. Law Rep. 1397, which was a case in some respects similar to the one under consideration, except that the decedent was an infant, the rule on the question in hand is thus stated: "It is earnestly insisted for the city that there can be no recovery, although it was negligent in having the hot wire in the street, for the reason that the intestate knew the danger and voluntarily took the risk, assuming that, if he stood on the board, the electrical current would not hurt him. This would be true of an adult, but the question is whether the same rule should be applied to an infant 12 years old." The courts have gone a long way in saying that the highest possible care should be used by those who manufacture and sell electricity, because the electric current being invisible and silent is difficult to discover and guard against in advance of its fatal effects; and while perhaps this reasoning cannot be applied strictly to a telephone company, which is not engaged in carrying electricity for sale or distribution, but only carries a current, not at all dangerous to human life, for its own purposes, we do not deem it necessary to stop here to draw or point out the distinction between it and the electric light and power companies proper. The rule is so well established that it needs no citation of authoriy to support it that where one knows of a dangerous condition, although it is brought about by the negligence of another, he cannot idly or wantonly experiment with it at the risk of that other.

The sum total of plaintiff's evidence, so far as appellant is concerned, is that the decedent was killed by coming in contact with one of its boxes which had

Digitized by Google

become charged with electricity by the crossing of its wire with an eletric light wire. The defendant, without contradiction, showed all the facts we have detailed above with reference to the decedent's knowledge of the dangerous condition of the telephone box, and the manner of his being killed by wantonly experimenting with a known danger. It seems to us clear that the court should have sustained the motion for a peremptory instruction, made at the close of all the testimony, to the jury to find a verdict in favor of appellant.

The judgment is reversed for proceedings consistent herewith.

Petition for rehearing by appellee overruled.

CASE 89.—ACTION BY SALLIE CHAPPELL AND OTHERS AGAINST HENRY CHAPPELL AND OTHERS TO SET ASIDE THE SALE OF CERTAIN SHARES OF STOCK.—February 22.

Chappell, &c., v. Chappell, &c.

Appeal from Leslie Circuit Court.

H. C. FAULKNER, Circuit Judge.

Judgment for defendants. Plaintiffs appeal. Affirmed.

1. Executors and Administrators—Dividend-Paying Securities—Sale.—Ky. Stats., 1903, sec. 4707, declares that no administrator or executor shall sell any dividend-paying securities which the decedent owned at his death until so ordered by the court. Held, that such section applied only to stocks, that

Digitized by Google

were actually paying dividends, and not to stocks which "may" at some time pay dividends.

2. Same.—Ky. Stats., 1903, sec. 4707, prohibiting an executor or administrator from selling dividend-paying securities without an order of the court, by necessary implication authorizes an executor or administrator to sell non-dividend paying stocks as personal property.

3. Same—Sales—Vacation—Fraud.—In a proceeding to set aside an administrator's sale of certain stock belonging to his intestate for fraud, it was necessary that the petition allege the facts constituting the fraud.

4. Same—Evidence.—In a suit to set aside an administrator's sale of certain stock for fraud, evidence held to sustain a finding that the sale was not fraudulent in fact.

H. C. EVERSOLE, W. S. MOBERLY and T. G. LEWIS, attorneys for appellants.

POINTS AND AUTHORITIES.

1. "Sales by administrator or executor are void, if made without order of court, or in any manner not authorized by law; and property so sold, may be recovered by the distributees or legatees from the parties holding it." (Ware v. Houghton, 93 Am. Dec., 258.)

2. "Sales by administrators must be made in a manner provided by law; and if made at a place or time other than those prescribed by the statutes or decree, they are not only irregular but void." (Triplett v. Mizer, 94 Am. Dec., 313.)

3. "Void administration sale is not rendered valid against heirs, because they receive the benefit of the proceeds, particularly so, when they are minors." (Valle v. Fleming, 61 Am. Dec., 566.)

4. "Executor has no right to borrow money for the estate of his testator, unless expressly authorized by the will." (Lucich v. Medin, 93 Am. Dec., 576.)

5. We feel that the first section of our argument has been overwhelmingly sustained, and our position therein outlined established by the authorities above quoted, and the various extracts therefrom copied into this brief.

AUTHORITIES RELIED ON.

Kentucky Statutes, 4707; "Cyc.," vol. 18, p. 356; "Cyc.," vol. 18, p. 251 and note 19, p. 252; Citizens Railway Co. v. Robbins, 12 L. R. A., 501, 502; U. S. Sup. Ct. Rep., 34-37 (10 Peters) Ventrees,

Digitized by Google

et al., v. Smith, 387 (173); Emor v. James, 4 Mum., 194; 7 Mass., 488; U. S. Cir. Ct. of Appeals, 53 L. R. A., 684 687, on the liability of corporations for transferring stock, on its books without full authority; Ware v. Houghton, 93 Am. Dec., 258; Triplett v. Mize, 94 Am. Dec., 313; Valle v. Fleming, 61 Am. Dec., 566; Lucuch v. Medin, 93 Am. Dec., 376; Am. and Eng. Enc. of Law, 1st Ed., pp. 615, 616; 4 Johns Ch. 368; 6 Cond. Rep., 387; Com. Dig. Tit. Market E.; 1 Johns Rep., 478; St. Romes v. Levee Cotton Press Co., U. S. Sup. Ct. Rep., 290; Western Union Tel. Co v. Davenport, 97 U. S., 369 (24, 1047); Loring v. Salisbury Mills, 125 Mass., 138; Pratt v. Taunton Copper Mfg. Co., 123 Mass., 110; Pennsylvania R. R. Co.'s Appeal, 86 Pa., 80; Loring v. Frue, 104 U. S., 223 (26, 713); Salisbury Mills v. Townsend, 109 Mass., 115; 31 La. Am., 224, 229; Civil Code, 474 (466); Civil Code, 3506 (3472); Civil Code, 3536, (3501), 3544, (3508); Case v. Citizens' Bank, 100 U. S. 446 (25, 695); "Cyc.," vol. 18, p. 763; Wyman v. Campbell, 31 Am. Dec., 691; 52 Am. Dec., 399, Worthy v. Johnson; Williamson v. Williamson, 41 Am. Dec., 636; Hamilton v. Pleasants, 98 Am. Dec., 551; "Cyc.," vol. 18, p. 358; Am. Dig. (Cen. Ed.) vol. 22, sec. 634; Donaldson v. Hull, 7 Mart. (U. S.) 113; Am. Dig. (Cen. Ed.) vol. 22, p. 995; Herron v. Marshall, 24 Tenn., 443; 42 Am. Dec., 444; Am. Dig., vol. 18, sec. 649; Trimble's Executrix v. Lubus, 94 Ky., 304; Am. Dig., vol. 22; French v. Curier, 47 N. H., 88; Pratt v. Taunton Copper Co. (123 Mass., 110) 25 Am. Rep., 37; Stevenson Heirs v. McReary, 51 Am. Dec., 102; Geyser-Marion Gold Mining Co. v. Charles B. Stark, 53 L R. A., 684; Lowry v. Commercial & Farmers' Bank, Fed. Cas. No. 8581; Albert v. Savings Bank of Baltimore, 1 Md Ch., 407; City of Baltimore v. Normen, 4 Md., 352; Marbury v. E. H. Len, 20 Am. St. Rep., 467; Weymer v. Second National Bank, 57 Ind., 198; Saltus and Saltus v. Everett, Am. Dec., vol. 32, p. 540; Am. Dec., vol. 32, p. 551; Am. Dec., vol. 32, p. 555; Williamson v. Nerle Am. Dec., vol. 25, pp. 65, 616; Brown v. The Howard Fire Insurance Co., Am. Rep., vol. 20, p. 90.

E. S. JOUETT, W. M. BECKNER, D. B. LOGAN and J. H. JEFFRIES, attorneys for appellees.

SYNOPSIS OF POINTS AND AUTHORITIES.

A decree of court to sell the stock in controversy was not necessary, as it was not dividend-paying stock.

1. Ordinarily an administrator has full power to sell stock as other personalty. (Cook on Corporations, sections 329, 393; Kentucky Statutes, section 3853.)

2. Section 4707 of Kentucky Statutes, which requires a decree of

Digitized by Google

court for a personal representative to sell "dividend-paying stocks, bonds and other security," refers to stocks, etc., that are paying dividends, and not, as appellants claim, to the stock of commercial corporations in general in contrast with eleemosynary corporations.

(a) Interests in eleemosynary corporations are not subjects of barter and sale.

(b) "Stock" is not an incident of eleemosynary corporations; it represents money value, and in fact, as well as by the express terms of our statute, applies solely to corporations that are run for a profit. This is also shown by its being linked with "bonds and other security." (Kentucky Statutes, sections 879, 883.)

(c) Section 4706 uses in the same sense the terms "dividend-paying securities," showing the same division of securities (which are necessarily commercial only) into those which produce an income and those which do not.

(d) Section 4707 itself recognizes this classification, when in its earlier part it gives to trustees a general power to sell "stocks, bonds, etc., and then later restricts that power in the case of one kind of trustee—a personal representative—selling one kind of stocks, bonds and other security—those that are dividend-paying."

(e) This court in Trimbles' Adm'r v. Lebus, etc., 94 Ky., 304, expressly held that section 4707 was "intended to apply to and control exercise by an administrator or executor of their general authority to sell and dispose of stocks and bonds paying dividends," and hence held that the statute did not apply to stock in a bank which had paid no dividends for two years.

3. The company, the sale of whose stock is in controversy, was organized in 1890 with a capital stock of one million dollars over two-thirds of which was water. On September 28, 1896, when the sale was made, it owed nearly $400,000.00. It had never paid a dividend prior to the sale and never did pay one, and could not have legally done so, until six years after the sale, when it finally wiped out its debt and then for the first time in twelve years of its existence made a return to its stockholders—and this was in the nature of a liquidation dividend. (2 Thompson on Corporations, sections 2126, 2152; Cook on Corporations, section 546.)

4. Absolutely no proof was offered by appellant to sustain their charge that the sale was fraudulent. Its good faith and fairness were conclusively established.

5. If appellants had successfully attacked the sale they could have had no relief in this action.

(a) No relief was asked against the administrator.

(b) The purchaser was not before the court.

(c) His transferees would not have been liable. (1 Cook, 731; 2 Thompson, section 1368.)

Digitized by Google

(d) The company in a case like this would not have been liable for registering the transfer. (2 Thompson, sections 2529, 2531, 2534.)

6. Stock in a corporation is not realty, as claimed by appellants, but is personal property in the nature of a chose in action, which passes to the personal representative. (Spalding v. Payne, 81 Ky., 416; 1 Cook, 44.)

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

John C. Chappell owned at his death in February, 1892, 6,100 shares of stock, of the par value of $10 each, in the Asher Lumber Company. Henry Chappell, his brother, qualified as his administrator. The personal estate failed to pay the debts, and his administrator borrowed $2,000 for this purpose of G. M. Asher, pledging to Asher the stock referred to to secure the money. In the year 1896 Asher brought a suit on the note and sought the enforcement of the lien. The administrator then, on September 28, 1896, sold the stock at public outcry, after giving adequate notice of the sale. It brought $2,501, which paid the debt to Asher, and left a balance in the hands of the administrator. In the year 1902 this suit was brought by John Chappell's two infant children, by their statutory guardian, to set aside the sale of the stock. The case was voluminously prepared, and on final hearing the circuit court dismissed the petition. From this judgment the plaintiffs appeal.

It is insisted for the plaintiffs that the administrator was without authority to sell the stock, and that no title passed by the sale. Section 4707, Ky. Stats., 1903, provides: "All persons or corporations holding stocks, bonds or other securities, in a fiduciary capacity for loan or investment, shall have power to sell and transfer the same whenever in the judgment

Digitized by Google

of such fiduciary such sale will benefit the trust estate, and reinvest the proceeds as in section 4706 of this chapter authorized; but no administrator or executor shall sell any dividend-paying stocks, bonds or other security which the decedent owned at his death, until so ordered by a court of general equity jurisdiction in the county where letters of administration was granted or the will recorded." It is conceded in the record that the stock in question had not paid any dividends since the organization of the company about the year 1889, and that at the time the stock was sold the company had been for several years losing money, and was heavily in debt. But it is insisted that the words "dividend-paying stocks" refer to stocks upon which dividends may be paid, and not to those that are actually earning dividends. If the construction urged by the plaintiffs is adopted, then the personal representative could only sell stocks in corporations organized for charitable purposes. But that is not the character of stocks that the Legislature had in mind. The language of the statute—"dividend-paying stocks, bonds or other security"—shows that the Legislature had in mind securities in which money is invested. In the preceding section authorizing such investments the fiduciaries are authorized to invest "in such other interest-bearing or dividend-paying securities as are regarded," etc. The meaning of section 4707 is that where stocks are paying dividends, and are thus interest-bearing, the executor must not sell them until ordered by a court of general equity jurisdiction. If the statute does not mean this, then it would be practically valueless, for there would be no case worth mentioning when an executor could sell stocks without an order of court. This construction of the statute was adopted in Trimble's Ex'r v. Lebus, 94 Ky., 304, 15 Ky. Law

Digitized by Google

Rep., 85, 22 S. W., 329, and we see no reason for departing from the rule indicated in that case. It was held in Price v. Price's Heirs, 36 Ky., 107, and in Copeland v. Copeland, 70 Ky., 349, that stock in two railroad companies incorporated under the laws of this State were real property and not personalty. But these decisions rested largely on the prhaseology of the acts under which the companies were incorporated, and the Legislature thereafter passed an act declaring all railroad stocks personal property. The entire trend of modern authority is to the effect that stock in a corporation is personal property (1 Cook on Corporation, 41; 10 Cyc. 366), and this rule was recognized by this court in Spalding v. Paine's Adm'r, 81 Ky., 416, 5 Ky. Law Rep., 391. Besides, the statute that no administrator or executor shall sell any dividend-paying stocks which the decedent owned at his death by necessary implication authorizes the administrator or executor to sell stocks that are not dividend-paying, and thus recognizes such stocks as personal property. We therefore conclude that the stock was personal property, and that the administrator had authority to sell it.

It is also insisted that the sale was fraudulent, and was procured by fraud. There is no doubt that the administrator acted honestly and in the exercise of his best judgment in selling the stock, under the direction and counsel of a skillful attorney of high character. But it is insisted that the administrator and his attorney were imposed upon. The facts of the matter are these: The two Ashers, Cross, Chappell, and W. M. Beckner organized the Asher Lumber Company in the year 1889. It was a Michigan corporation. The capital stock was placed at 100,000 shares of $10 each. About the time they formed the company, and before they had completed

Digitized by Google

the organization, the two Ashers sold out their interest in the company to Brabb and Randall for $200,000. It was stipulated in the trade that Beckner and Chappell might go out on the same terms for their interests, but they decided to stay in. This occurred in 1889. Brabb took Burt in—just at what time does not positively appear, but perhaps about 1890. Thus matters stood until the death of Chappell in 1892. In the trade when the Ashers went out Brabb and Randall assumed all the obligations of the company; that is, they took the stock of the two Ashers, and agreed that the company would pay all of its obligations. Just how much the company owed at this time does not definitely appear, but proof is that, when the stock was sold in 1896, the debts of the company amounted to $380,000. At that time a great panic had swept over the country, timber lands had greatly depreciated in value, and there was little market for such property. So far had this gone that fears were entertained that the property of the company would not pay its debts. This was the reason that the administrator made the sale when he did, and it was for this reason that Asher brought suit upon his note. It does not appear that Asher had any interest in it. When Burt learned that the stock was to be sold, he wired his agent to buy it for him as cheap as he could, not exceeding five cents. The agent attended the sale, and bought it for about four cents. Burt had no hand in bringing about the sale, and had nothing to do with it, except to order his agent to bid for him after he learned the sale was to be had. He testifies that he only bid in the stock to prevent its falling into unfriendly hands, and in this his testimony is confirmed. There was therefore no fraud directly in the sale of the stock.

But it is insisted that the sale was brought about

Digitized by Google

by fraud, in this: That the administrator was induced to sell by the fact that he was made to believe that the debts of the concern amounted to $380,000, when, in fact, the debts were only $180,000, and that, if the true condition of the concern had been disclosed, the stock would have been rated much higher, and would not have been sold at such a sacrifice. It is insisted that the $200,000 that was paid to the Ashers for their interest in the concern was paid to them in the notes of the corporation, and that this $200,000 went to make up the $380,000 of debt above referred to. It is manifest that if the notes of the corporation were used to buy the stock of the Ashers, and this money became the debt of the corporation, then the stock of the Ashers belonged to the corporation, and not to Brabb, Randall, or Burt.

It is insisted that the testimony of G. M. Asher shows that the $200,000 paid them went to swell the debts of the corporation. We have read and re-read with care his deposition, and we do not clearly understand just what he does mean to say. On the other hand, Burt says that the entire debt of $380,000, except $25,000, was for borrowed money. The allegations of the petition do not assail the transaction upon this ground. The rule is that in a petition to set aside a contract on the ground of fraud the facts constituting the fraud must be alleged. In the petition in this case no such facts are charged, and this may account for the unsatisfactory condition of the proof on the subject, as neither parties nor counsel had their attention directed to it. But we do not rest our judgment here. We rest it upon the fact that Beckner and Chappell were two of the original stockholders and organizers of the company; that they stayed in after the Ashers went out; that Chappell lived something over two years after the Ashers went out, and after

Digitized by Google

the transaction in question was had. In the absence of any evidence to the contrary, it must be presumed that the transaction of the corporation was fair and right, and was satisfactory to him and Beckner, for there was never any complaint in this matter, so far as the record shows, until the case reached this court on appeal. The transaction with the Ashers occurred in 1889. It occurred between them and Brabb and Randall. It took place something like seven years before the stock in question was sold, and the sale of the stock in question could not have been contemplated in that transaction. There is not in the record any proof that Burt made any representations to anybody as to the condition of the company, or as to what the stock was worth, or in any way misled any of the parties. In a case of this sort to set aside a sale the proof of fraud must be clear. The chancellor will not upon obscure evidence convict a party of fraud, and, where the evidence is doubtful, in a case like this, the judgment of the chancellor will not be disturbed on the facts.

Judgment affirmed.

Petition for rehearing by appellants overruled.

Digitized by Google

CASE 90.—PROCEEDINGS BY SAMUEL STANLEY'S ADM'R AND OTHERS FOR A SETTLEMENT OF THE DECEDENT'S ESTATE.—February 22.

Spradlin, &c., v. Stanley's Adm'r, &c.

Appeal from Floyd Circuit Court.

A. J. KIRK, Circuit Judge.

From the judgment the widow and children of the deceased appealed. Reversed in part.

1. Appeal—Delay—Dismissal—Plea in Bar.—Where an appeal not taken within the statutory time is sought to be dismissed on that ground, the statute must be pleaded.
2. Same—Objection in Court Below—Necessity.—A person sui juris who stands by and permits a commissioner's report allowing claims against the estate of decedent which are not properly verified to be confirmed, and a judgment to be entered, cannot for the first time on appeal object that the claims were not properly verified.
3. Infants—Actions Against Infants—Effect of Error—Reversal.—As an infant cannot waive his rights by failure to object during the trial, an erroneous judgment against an infant must be reversed on appeal where his condition appears in the record; and, where his condition does not appear, the error may, under the express provisions of Civil Code Prac., section 518, be corrected by the court rendering the judgment.
4. Executors and Administrators—Claims Against Decedents—Verification—Sufficiency.—An affidavit to a claim against a decedent, averring that there is "no legal offset or counterclaim" against the demand, is insufficient within Ky. Stats., 1903, section 3870, providing that demands against a decedent must be verified by an affidavit stating that there is no "offset or discount" against the same; the word "legal" rendering the affidavit only a statement of the belief of the affiant as to the legality of an offset, and the word "counterclaim" not being synonymous with the word "discount."
5. Same.—An affidavit in support of a claim against the estate

Digitized by Google

of a decedent must comply with Ky. Stats., 1903, section 3870, requiring such claims to be verified by the claimant or his agent or personal representative, and, if the demand be other than an obligation signed by decedent or a judgment, the same shall be verified by a person other than the claimant, who shall state that he believes the claim to be just and give the reasons for his belief.

6. Same—Limitations—Pleadings—Necessity.—The objection that a claim against a decedent is barred by limitations, as a ground for refusing to order a sale of land to pay debts of a decedent, must be made in the circuit court by written exceptions, and, on such exceptions being filed, the claimant must be allowed a reasonable time to take proof, if he so desires.

JAMES GOBLE for appellant.

W. S. HARKINS for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing in part.

Samuel Stanley died a resident of Floyd county on January 24, 1901, leaving a will by which, among other things, he directed his executor to pay his debts as soon as practicable after his death. F. P. Conley was appointed administrator of the estate with the will annexed, and, the personal property being exhausted, brought this suit on February 10, 1904, for a settlement of the estate and a sale of so much of the land as might be necessary to pay the debts. The widow and children were made defendants to the action. The children all being infants, a guardian ad litem was appointed for them. The case was referred to the commissioner to report the debts. He took proof and filed a report, allowing debts against the estate to the amount of something over $300. The report was confirmed without exception, and, the guardian ad litem having filed a report that after a careful examination of the record he was unable

Digitized by Google

to make an affirmative defense, the circuit court ordered a sale of the land owned by the testator, or so much of it as might be necessary to pay the debts and costs. This judgment was entered on June 28, 1904. The commissioner sold under the judgment a tract of land on August 22, 1904, for $450, which was sufficient to pay the debts, interest, and costs. William M. Conley was the purchaser. The land sold was appraised at $450. The report of sale was filed and conconfirmed without objection, and a deed made to the purchaser on October 28, 1904, the purchaser being awarded a writ of possession for the land. After all this, on the 24th of August, 1906, this appeal was sued out by the widow and children, the widow having in the meantime married a second time.

In the brief for appellees it is urged that the appeal should be dismissed as to the widow because not taken within two years after the judgment of sale was entered. But no plea of limitation has been filed. Where an appeal is sought to be dismissed on the ground that it is barred by limitation. the statute must be pleaded. It cannot be made available unless it is pleaded. Riley v. Reed, 13 Bush, 411.

The objections made to the proceeding rest mainly upon the ground that the claims allowed against the estate were not properly verified. No objection was made in the circuit court upon this ground. A party who is sui juris cannot stand by and permit the commissioner's report allowing claims against the estate which are not properly verified to be confirmed and a judgment to be entered without objection, and for the first time make the objection on appeal to this court that the claims were not properly verified; for, if the claims had been objected to in the circuit court, the claimants might have supplied the necessary affidavits. Where a party who is sui juris stands by and

Digitized by Google

permits the claims to be allowed without objection, he must be held on appeal to have consented to the allowance of the claims or to have waived his objection to the want of proper verification. The purpose of setting a commissioner's report of debts for exceptions in a case like this is to give the parties an opportunity to present to the court any objections they may have, and to allow parties sui juris to make no objections in the circuit court, and for the first time, on appeal to this court, insist that the claims were not properly verified, would defeat the object of the proceeding. In the case of Worthley v. Hammond, 13 Bush, 510, there was no commissioner's report. There had been no point in the proceeding at which defendant had been called on to make the objection, and the question of waiver was not considered.

But as to the infants a different principle applies. They cannot waive any of their rights by mere failure to object. An erroneous judgment against an infant where his condition appears in the record must be reversed on appeal. Where the error does not appear in the proceedings or the condition of the defendant in the record, the error may be corrected by the court rendering the judgment. Civil Code Prac., section 518; Oliver v. Park, 101 Ky. 1, 19 Ky. Law Rep. 179, 39 S. W. 423. Sections 3870 and 3872, Ky. Stat., 1903, are as follows:

"Section 3870. All demands against the estate of a decedent shall be verified by the written affidavit of the claimant, or, in his absence from the State, by his agent, or, if dead, by his personal representative, stating that the demand is just, and has never to his knowledge or belief been paid, and that there is no offset or discount against the same, or any usury therein; and if the demand be other than an obligation signed by the decedent or a judgment, it shall also be

Digitized by Google

verified by a person other than the claimant, who shall state in his affidavit that he believes the claim to be just and correct, and give the reasons why he so believes."

"Sec. 3872. Before such affidavit is made, no action shall be brought or recovery had on any such demand, nor until demand of payment thereof has been made of the personal representative, accompanied by the required affidavit."

The affidavits to the claims are not sufficient. An affidavit that there is no legal offset or counterclaim against the claim does not comply with the statute. The word "legal" is not in the statute, and the insertion of this word renders the affidavit only a statement of the belief of the affiant as to the legality of an offset against it. The word "counterclaim" is not synonymous with "discount." "Discount" is any deduction, while "counterclaim" is ordinarily used to signify some claim against the debt. If the charges are more than reasonable, or if the consideration of the contract has partly failed, there would be a discount against the claim, although not a counter-claim in the ordinary use of the term. Many of the affidavits do not state that the claim is unpaid. The affidavit of the claimant must conform to the statute, and, if the demand be other than an obligation signed by the decedent or a judgment, it must be verified by a person other than the claimant, who must state facts showing that the claim is just, in addition to the statement that he believes the claim to be just and correct. The proof taken by the master would seem to establish the justice of the claims, but for want of proper verification by the claimants no judgment should have been entered in favor of the claimants as against the infants. We see no error in the sale or in the order confirming the sale, and the title of the purchaser at

Digitized by Google

the sale is not affected by the reversal of the judgment. Yocum v. Foreman, 14 Bush, 494. The commissioner reports that the land sold is part of that ordered to be sold, and there is nothing in the record to show that he did not comply with the order of the court.

On the return of the case to the circuit court, the claimants will be given a reasonable time to file the proper affidavits verifying their claims. It is insisted that some of these claims are barred by limitation, but this objection must be made in the circuit court by written exceptions, and, if exceptions are filed, the claimants should be allowed a reasonable time to take proof, if they desire. As the claims have all been allowed by the commissioner, another reference will be unnecessary. On final hearing the court will enter such judgment as is necessary to do justice between the parties.

The judgments appealed from are affirmed as to the adult appellants, but as to the infant appellants the judgment confirming the commissioner's report of debts and ordering a sale of the land is reversed.

Digitized by Google

CASE 91.—ACTION BY RALPH A. LINDSAY'S ADMINISTRATOR AGAINST THE METROPOLITAN LIFE INS. CO. TO RECOVER ON A POLICY ON THE LIFE OF THE DECEDENT.—February 22.

Metropolitan Life Ins. Co. v. Lindsay's Adm'r

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Insurance—Life Policy—Payment of Premium.—A life policy issued to insurer's soliciting agent stipulated that the insurer assumed no obligation until the first premium had been paid. The superintendent of the insurer paid the first premium, and the agent was charged with it by having the same deducted from commissions due him as soliciting agent. The insurer received the premium and accepted it. Held, that the first premium was paid, within the stipulation of the policy.
2. Same.—A life policy issued to insurer's soliciting agent stipulated that insurer assumed no obligation until the first premium had been paid. The superintendent of the insurer paid the first premium. The insurer accepted it. The insurer had a rule prohibiting the return of policies issued on the lives of superintendents and agents. Held, that the first premium was paid, rendering the policy enforceable.

J. S. BOTTS and ALLEN & DUNCAN, attorneys for appellant Life Ins. Co.

The substantial question on this appeal is whether the policy ever attached, and the appellant claims a reversal of the judgment on the following grounds:

1. Because there was no completed or consummated contract of insurance between the parties binding either the appellant company or the applicant for insurance, as the premium on the

Digitized by Google

policy in suit was never paid by the said Ralph A. Lindsay or by anyone else at his instance or request or with his consent or knowledge, and there was no obligation on his part to pay said premium; and further that the policy was never duly delivered during the life-time and good health of the person on whose life the insurance was applied for or any other time; and that until the performance of these two conditions precedent, as required by the terms of the policy, no agreement had been entered into binding either insured or the insurer and up to that point either party had a right to withdraw from the negotiations without liability to the other. The element of mutuality so essential to the validity of all contracts was always lacking.

2. That the finding of the jury was induced by errors of law in the instructions prejudicial to the appellant, to which errors the finding in question are directly and certainly traceable as the inducing cause.

3. That the court in refusing to give to the jury the several instructions asked for by the appellant company erred in its ruling as to each of the instructions so asked.

4. That the court erred in each of the instructions given by it to the jury.

5. Errors in the admission and rejection of evidence.

6. That the verdict and judgment was not sustained by sufficient evidence and was contrary to law.

7. Error of the court in overruling defendant's demurrer to plaintiff's petition.

AUTHORITIES CITED.

St. Louis Mutual Life Insurance Co. v. Kennedy, 6 Bush, 450; Mutual Life Insurance Co. of N. Y. v. Lucas, 25 Ky. Law Rep., vol. 2, p. 2052; Mutual Life Insurance Co. of N. Y. v. Sinclair, 24 Ky. Law Rep., vol. 2, p. 1543; Dickerson's Adm'r, &c., v. The Prudential Savings & Life Assurance So., &c., 21 Ky. Law Rep., 611; New York Life Ins. Co. v. Leavy's Adm'r, 92 S. W., 325; Blue Grass Insurance Co. v. Cobb, 24 Ky. Law Rep., 2132; May on Insurance, vol. 1, secs. 56, 61 and 55; Wm. Whiting, Adm'r v. Mass. Mutual Life Ins. Co., 129 Mass., 240, (Sept. 24, 1879); Eliab W. Badger, Adm'r v. Amer. Popular Life Ins. Co., 103 Mass., 244; Dunham and others v. Moss, 32 N. E., 116, and 158 Mass., 132; Brown v. Massachusetts Mutual Life Ins. Co., (59 N. H., 298) 47 Amer, Reports, 205; Mutual Reserve Fund Life Ass'n v. Simmons, 107 Fed. Rep., 418; Mutual Life Insurance Co. of N. Y. v. James Young, Adm'r of McPhearson Young, 90 U. S. Reports, p. 152, Law Co-op. Ed., 23rd vol.; The Piedmont & Arlington Life Ins. Co. v. Ewing, 92 U. S., vol. 23, Law Co-op. Ed.,

Digitized by Google

p. 610; McMaster v. New York Life Ins. Co., 99 Fed. Rep., 856; Gidding v. Ins. Co., 102 U. S., 108; Pottsville Mutual Fire Ins. Co. v. Menneque Springs Imp. Co., 100 Pa. St. Rep., 137; Real Estate Mut. Fire Ins. Co. v. John Roessle, 1 Gray (Mass.) 336; James Mulrey v. Shawmut Mut. Fire Ins. Co., 4 Allen (Mass.) 116; Insurance Co. v. Young, Adm'r, 23 Wallace (U. S.) 85; Hoyt v. Mutual Benefit Ins. Co., 98 Mass., 539; Markey v. Mut. Benefit Ins. Co., 103 Mass., 78; Marion National Bank v. Abell's Adm'r, 88 Ky., 428.

FORMAN & FORMAN, attorneys for appellee.

POINTS AND AUTHORITIES.

1. An unconditional application for life insurance constitutes an offer to contract, and an unqualified acceptance of the application constitutes an acceptance of the offer; and the contract immediately becomes completed subject only to such condition or conditions as may be stated in the application and agreed upon by the parties as essential to be performed before the attachment of the risk. The tender of a policy of the exact kind applied for—in cases when delivery and payment of premium are made essential under the application to the consummation of the contract—imposes upon the applicant an enforceable obligation to pay the premium and take the policy, and if he declines, the company has an immediate right of action therefor, as in such cases no right of inspection with the incident right of acceptance or rejection after issuance of the policy exists in the applicant. (Western Assurance Co. v. McAlpin, 77 Am. St. Rep., 429.)

2. When the minds of the parties have met upon the terms of the contract through an unqualified acceptance of the offer contained in the application, and a policy is issued in conformity therewith and forwarded for delivery upon the payment of the premium (which under the application is the only condition annexed to the attachment of the risk) the contract becomes consummated whenever the premium is paid, notwithstanding the policy may never have been manually transferred by the agents of the company to the insured. Manual possession of the policy is not essential to complete the contract even when the application provides that "delivery" of the policy is a condition precedent to the completion of the contract. (Phoenix Assurance Soc. v. McAuthor, 6 Am. St. Rep., 154; N. Y. Life Ins. Co. v. Babcock, 69 Am. St. Rep., 134; Mutual Life Ins. Co. v. Thompson, 94 Ky., 253; Dailey v. Preferred etc., Association, 26 L. R. A., 171; May on Insurance, sec. 60.)

3. Payment of the premium by a third party, who has no

Digitized by Google

insurable interest in the life of the applicant, after the terms of the contract between the applicant and the company have been mutually agreed upon and accepted, does not invalidate the contract of insurance, whether the payment was made with or without the knowledge or request of the applicant. (Galvin v. Union Central Life Ins. Co., 115 Ky., 547; May on Insurance, sec. 352; Prudential Ins. Co. v. Cummins' Adm'r, 19 Ky. Law Rep., 1770; Mutual Life Ins. Co. v. Allen, 52 Am. Rep., 245; Wheeler v. Waterton &c., Ins. Co., 131 Mass., 1.)

4. Applying these principles to the evidence appearing in the record, the trial court's instructions contained the whole law applicable and the finding of the jury was justified, even under the appellant's theory of the facts, which is that the amount of the premium was paid with H. W. Pitman's money and without the knowledge or request of the applicant, for it must be assumed in the consideration of the case that the great preponderance of the evidence established the fact that the payment was made to and accepted by the company as premium and not as penalty.

5. But the evidence warrants the conclusion that the premium was actually paid out of Lindsay's own earnings as an employee of the company; and with his knowledge and consent; and that under this theory of the facts the jury found their verdict under the third instead of the fourth instruction. (See testimony of Mr. and Mrs. Lindsay and direct examination of H. W. Pitman, q. and a. 33, 34.)

6. Being an employee of the company and presumptively familiar with its rules, it may be fairly inferred that Lindsay knew of the payment of the premium whether made with his money or Pitman's; and after June 10th, when same was remitted, his promises to pay, as claimed by Montague, were intended and were in fact promises to reimburse Pitman and not to pay the company, if it be true that Pitman's money was used in payment of the premium.

7. Lindsay formally agreed to accept the policy when explained to him by the agent, Montague, and promised to pay the premium. No case is cited, nor can any be found, as we believe, where it was ever held that when such an acceptance existed, the risk did not attach immediately upon payment of the premium, even though paid by a third party without the knowledge or request of the applicant.

Digitized by Google

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This action was instituted by appellee upon policy No. 381,557 of insurance upon the life of Ralph A. Lindsay, of Lexington, Ky. The policy was dated May 13, 1905, and was issued upon an application of May 5, 1905. Lindsay lost his life, by accidental drowning, on the 21st day of July of the same year. Appellant defended, and alleged that the assured, Ralph A. Lindsay, had never paid his first, or any, premium on the policy, and that it was never delivered to him; that under the provisions of the policy the same never became binding on it, and quoted the following provision: "No obligation is assumed by this company upon this policy until the first premium has been paid, and the policy duly delivered, nor unless upon the date of delivery the insured is alive and in sound health." The answer was controverted by appellee, and a trial was had, which resulted in a verdict for appellee for the amount of the policy.

The appellant assigns as reasons for a reversal of the judgment the following grounds: First. The court erred in its instructions to the jury, and also erred in refusing to instruct the jury as requested by the appellant. Second. The court erred in the admission and rejection of evidence. Third. That the verdict and judgment are not sustained by sufficient evidence, and are contrary to law.

It appears from the proof that appellant had an office in Lexington, Ky.; that one Pitman was its general superintendent in charge; one Montague was the assistant superintendent, and R. A. Lindsay, the deceased was one of the soliciting agents for appellant at that point; that on or about the 2d day of April, 1905, Lindsay made application for the policy sued

Digitized by Google

on, which was sent to the company by the superintendent on the 13th day of May. The policy was issued and reached Lexington about the 14th of the same month. The terms of the policy were in exact accordance with those of the application. The assured delivered the policy and the receipt for $15.12, the first premium on the policy, to his mother for safekeeping. The assured ceased to be agent for the company the latter part of June, and left the city, and while away met his death.

The appellee introduced one Miss Richardson, who testified that she was the stenographer and bookkeeper in the appellant's office in Lexington during May and June, 1905, that she did most of the work on the books, and that the rest was done by Mr. Pitman. She also testified that one of her duties was to draw a report, from the books, and forward it to the home office, showing what collections had been made. One of the books of the appellant, kept at its Lexington office, was presented to her, and she stated that the following entry was made in that book by the direction of Mr. Pitman, to-wit: "Policy No. in full, 381,557. Name of insured, Lindsay. Premium, date when due, May 13. When paid, June 10. How paid, semi-annually. First year, $15.12. Renewal (heading nothing under it). Kind of policy, O. L. L. Commission paid (nothing under the heading). To whom paid, Lindsay. Rate, 40. Amount, $6.05. State in which insured now resides, Kentucky."

Mr. Pitman testified concerning the application made by the insured, saying that he forwarded it to the home office, and that, on the return of the policy, on the 14th day of May, he delivered it, with the receipt for the amount of the premium, to his assistant, Montague, for collection of the premium and the delivery of the policy and receipt to the assured, and

Digitized by Google

that the premium was not collected. He stated that he did not know personally about that, but it was so reported by his assistant. He also stated that, when Mr. Lindsay ceased to work as agent for the company, he was in arrears to the amount of $20 or $30, and the premiums on this policy, and the one for $500, payable to the assured's mother, were not included in the amount named; that he informed the mother and father that their son was behind with the company for the purpose of seeing if the matter could be arranged and settled without proceeding against the bonding company that was the surety of R. A. Lindsay; that they came to the office to see him, and they agreed to settle the amount he was in arrears with the company, but they did not. He also told them and Don Forman, one of the attorneys for appellee, that R. A. Lindsay had never paid the premium on this policy. He admitted that the entry in the book, as read by Miss Richardson, was correct, and that he paid the premium to the company by check the 17th day of June, or, at least, within 30 days from the receipt of the policy, within which time he was required to make his report and settlement. The witness stated that the reason he directed Miss Richardson to make the entry in the book referred to, and why he paid the premium by his own check, was that the company required him to do so, under the following rule, of September 17, 1903: "All applications submitted after this date on the lives of superintendants, assistant superintendents, and agents, or on members of their families, must be with the understanding that, if the policy is issued as applied for, it will be accepted. The return of such policies as 'Not taken' will not be permitted in the ordinary department or intermediate branch. In a number of instances where we have been under the painful neces-

Digitized by Google

sity of holding the superintendent responsible for the first premium on a 'Not taken' policy on the life of an agent, the statement has been made that since the application was written the agent had been 'finalled,' and that therefore the policy could not be delivered. We cannot accept this as a reason for not enforcing the rule. It is reasonable to assume that applications on the lives of our employes are submitted in good faith, that the insurance is not forced upon them, but is really wanted, and that they possess the means to pay for it. Otherwise the application should not be submitted. No hardship then entails upon the agent in the demand of the superintendent to deposit with the application the amount required to meet the first premium. If he fails in this precaution, intended for his own protection, he certainly ought not to complain of the personal loss this failure incurs."

The witness stated several times that he paid the premium on this policy for the assured, but he also stated that, after the date of the rule above copied. the company established another rule with reference to its agents, and sent it out in the form of a letter; that he did not have that letter himself, but one was sent, from the home office, to its attorneys in this case at Lexington, and that it was lost or misplaced. The court permitted the witness and one of the attorneys to testify as to the contents of it. Pitman stated that the contents of the letter was: "That the agent and the employe of our company taking out the policy did not accept it, refusing to accept, or wouldn't accept the policy. That we were liable to the company equal to the amount of the first premium." The attorney testified, in substance, the same, except he stated that: "When an agent delivered a policy without collecting the premium, they were to be fined in an amount equal to the premium."

Digitized by Google

Montague, the assistant, testified that, when the policy was received from the home office, it was delivered to him by Pitman, with the receipt for the amount of the premium, for collection of the premium on delivery of the policy. The next day Lindsay was in his office, he showed him the policy, which was examined by him, and he announced himself satisfied with it, and said that he would pay the premium on the next Thursday. The witness took the policy and receipt and put it in a pigeonhole of his desk. The next day he discovered they were gone. He met Lindsay and asked him if he had them. Lindsay said "Yes," that he had taken them home to his mother to see if she was satisfied with the policy. Witness told Lindsay that he must bring the papers back or pay the premium. Lindsay responded that he would. He frequently approached Lindsay about it afterwards, with a like result. He stated that the premium was never paid to him.

The father and mother of the deceased both testified that they went to see Pitman at his request, who told them of the shortage of their son, but they could never get Pitman to tell them the amount They asked him how he got behind. He answered that "If Ralph had not been so prone to take out so many policies for himself, or for his family, he would have more coming to him." Pitman concedes that, in effect, he made this statement to them when they were in his office. They, and also Don Forman, testified that Pitman never, before the death of Ralph, said anything with reference to the premium on this policy not having been paid. We have substantially stated the evidence of each witness that was introduced during the trial.

The court gave the jury six instructions, which are as follows:

Digitized by Google

"(1) The jury should find for the plaintiff, if the jury believe from the evidence that the policy of the defendant, dated the 13th day of May, 1905, was delivered after its issual to the decedent, Ralph A. Lindsay, and that the premium thereon of $15.12 was paid to the defendant.

"(2) The jury should find for the defendant, unless the jury believe from the evidence that the policy of the Metropolitan Life Insurance Company, dated the 13th day of May, 1905, was delivered to Ralph A. Lindsay, and that said premium thereon of $15.12 was paid to the defendant.

"(3) If the policy mentioned in the first and second instructions was issued by the defendant, and, after being so issued came into the possession of Ralph A. Lindsay, this was not a delivery of said policy, unless the premium of $15.12 was paid; but, if said policy came into the possession of said Lindsay, and after it came into his possession, said premium was paid to and accepted by defendant, said policy, after said payment and acceptance, became a policy delivered to said Lindsay. And if said policy was so in the possession of said Lindsay, and if said payment of said premium was so made to and accepted by the defendant, the jury should find for the plaintiff.

"(4) If the policy mentioned in the foregoing instructions was in the hands of Ralph Lindsay, and, being so in his hands, the premium due on said policy of $15.12 was paid by W. H. Pitman to the defendant, as the premium due on said policy, and if the payment so made was accepted by said defendant as the payment of the premium due on said policy, the jury should find for the plaintiff.

"(5) If the jury find for the plaintiff, they should find for him in the sum of $984.88, with interest from the 5th day of September, 1905, until paid.

Digitized by Google

"(6) If W. H. Pitman paid to the defendant $15.12, the amount of the premium due on the policy mentioned in the foregoing instructions, and if this payment was made by Pitman as a penalty due from him to the defendant, and not as a payment of the premium on the policy issued to the defendant, this was not a payment of such premium, and the jury should find for the defendant."

To arrive at a proper understanding of the issues made in this case, it is necessary to refer again to the terms of the policy and the answer of appellant. It is recited in the policy that the company assumes no obligation or risk until the first premium is paid and the policy duly delivered, nor unless upon the date of delivery the insured is alive and in sound health. In the defendant's answer it denied that the first premium was paid by R. A. Lindsay, and that the policy was ever delivered to him. The answer did not make any issue as to the health of the assured at the time of the delivery of the policy. This statement obviates the necessity of discussing the objections of appellant's counsel to the instructions of the court in omitting to submit to the jury the question of the health of the assured at the time of the delivery of the policy.

The only questions at issue that could properly be submitted to the jury in the instructions were whether the premium had been paid to and accepted by the company, and the delivery and acceptance of the policy by the assured. That assured was satisfied with the terms of the policy and agreed to pay the premiums was proven without contradiction. There was some proof introduced from which the jury might have concluded that he had settled, or paid, the premium; he being charged with it, and it being deducted from the commissions due him as agent in soliciting insurance, and in this way made the amount in arrears

Digitized by Google

to the company larger. It is true that Pitman stated that the premiums on the policies were not included in the arrears, but his statement to the father and mother that, "if Ralph had not been so prone to take out insurance for himself, or his family, he would have more coming to him," and the further fact that, in the conversation he had with them before the death of Ralph, he never at any time spoke of the fact that Ralph had failed to pay the premiums on the policies. From the proof it is certain that the company received and accepted from Pitman the premium on the policy of an amount equal to the premium as a penalty.

Appellant's counsel contends that, although Pitman, the superintendent, might have paid the premium for Lindsay, if it was done without his knowledge or consent, it did not operate as a payment of the premium, so far as Lindsay was concerned, and it never made the policy a binding contract. It is not necessary for us to determine this question, in view of the writing or rule copied above. If it was paid by Pitman as a premium upon the policy, it is reasonable to suppose that it was not done without the knowledge or consent of Lindsay. Lindsay was an agent of the company, and so was Pitman. They were presumed to know the rules of the company. If Pitman sent the application on to the company without first requiring Lindsay to make a deposit for the amount of the premium, and Lindsay and Pitman both knew that Pitman was responsible to the company for the amount of the premium, thereby he became the surety of Lindsay in that matter, and, when Pitman paid it, he had a binding obligation against Lindsay for the repayment to him of the amount. The company had received the premium and accepted it, and under the rule of the company it mattered not who

Digitized by Google

paid the premium, whether the assured or superintendent in charge of the office—one or the other had to pay it. The policy could not be returned as "Not taken."

By the sixth instruction the court told the jury that, if Pitman paid the amount of the premium to the company as a penalty for the violation of the rule of the company, and not as the premium on the policy, they would find for the defendant. The jury decided this question against appellant.

In view of what we have said, about the issues involved and the instructions given by the court, it makes it unnecessary to consider the instructions offered by appellant. Those given were as favorable to the appellant as it had a right to ask. We find no error committed by the court in the admission or rejection of evidence.

For these reasons the judgment of the lower court is affirmed.

Digitized by Google

CASE 92.—PROCEEDINGS TO CONTEST AN ELECTION FOR COUNCILMAN OF THE CITY OF PRINCETON BY JOHN G. ORR AND OTHERS AGAINST J. U. KEVIL AND OTHERS.—February 22.

Orr, &c., v. Kevil, &c.

Appeal from Caldwell Circuit Court.

J. F. GORDON, Circuit Judge.

Judgment for defendants. Plaintiffs appeal. Reversed.

1. Elections—Validity of Ballots—Signature of Clerk—Necessity. —Under Ky. Stats., 1903, sec. 1471, providing that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice, the absence of the clerk's name on the backs of a ballot does not invalidate it.
2. Same — Contest — Fraud — Record — Evidence — Sufficiency.— Under Ky. Stats., 1903, sec. 1596a, subsec. 12, providing that if it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the court of appeals finally, may adjudge that there has been no election, etc., the record and evidence in an election contest examined, and held to show such fraud and bribery in the conduct of the election as to avoid the same.
3. Same—Judges of Election—Cities of the Fourth Class—Council.—Ky. Stats., 1903, sec. 3486, providing that the board of council of a city of the fourth class shall judge of the eligibility and election return of its members, etc., has no application to a case of an election of councilmen contested on the ground of fraud and bribery in the conduct thereof.

R. W. LESANBY and P. H. DARBY for appellants.

JOHN C. GATES for appellees.

Digitized by Google

Opinion of the Court by Judge Barker—Reversing.

Princeton is a city of the fourth class, and its municipal legislature is composed of six councilmen elected by the city at large. At the general election held on November 7, 1905, the appellants were nominees on the Republican, and the appellees nominees on the Democratic, ticket for the offices of councilmen for the ensuing term. After the election, the returns were canvassed with the result that it appeared that appellees received votes in the aggregate running from 247 to 260, and the appellants from 226 to 238. Taking the highest vote received on the Democratic ticket, 260, and deducting therefrom the lowest received on the Republican ticket, 226, which is most favorable to appellees, there was only a difference of 34 votes between the vote received by the two tickets. Certificates of election were issued to appellees, and they were inducted into office; thereupon this action was instituted under subsection 12 of section 1596a, Ky. Stat., 1903, to contest the election. Without analyzing its allegations with minute particularity, in our opinion the petition states a valid cause of action for contesting the election of appellees. It is alleged that appellants received at the election a majority of all the legal votes cast, and that they were duly and legally elected and entitled to the offices in question; and there is pointed out certain specific frauds and wrongs done, the result of which made it appear that appellees were elected. Appellees in their answer denied the material allegations of the petition, and alleged affirmatively their own election and right to be councilmen of Princeton. These affirmative allega-

Digitized by Google

tions being controverted, the issues were complete. Princeton has five election precincts; four of them were carried by the appellees by small majorities; "No. 2" was carried by the appellants by a much larger majority than was received by the appellees in any one of their precincts. So far as this case is concerned, we shall confine ourselves to an examination of the claims of wrong done in the election at precinct "No. 2." These are, first, that there were a large number of votes cast for the appellees by voters who were bribed, and that these, in order to carry out the corrupt bargain between them and the appellees, formed themselves into a club called the "Independent Club," of which one Joe Morrow was president, and agreed upon the following plan by which it was to be known afterwards that they voted the Democratic ticket; each was to vote under the Democratic device and within the circle around it by making two distinct impressions with the stencil, and wherever such a mark was found, it was to be considered that the corrupt agreement had been carried into effect; second, the 35 legal ballots were wrongfully thrown out because the clerk's signature was not on the backs thereof, all of these being straight Republican votes. There were other allegations in the petition, in general terms tending to show other frauds and corrupt practices at the other precincts, but we shall not notice these further. The case was submitted for final judgment alone, on plaintiffs' (appellants') testimony, and the court entered a judgment dismissing their petition, and of this they are now complaining.

The testimony for the appellants showed the formation of the Independent Club, composed of negroes, who ordinarily voted the Republican ticket; that this club met from time to time just prior to the election, and agreed to vote for the Democratic nominees for

Digitized by Google

pay, and adopted the ruse of the double impression of the stencil as a means of showing that their corrupt bargain had been carried out, and that they were entitled to the bribery money; that, after the election, when the ballots at precinct "No. 2" were counted, it was found that there were 18 of these votes bearing the double impression of the stencil, and that several days later the club met again, and the president, Joe Morrow, distributed among the members the sum received for their votes. It was also shown without contradiction that the Democratic clerk at precinct "No. 2," while counting the ballots, asked the Republican challenger or inspector if he knew what the double impression which appeared upon some of the ballots meant, and upon receiving a reply in the negative, explained that it represented the negro votes which they (the Democrats) had bought. It also appears without contradiction, that there were 26 ballots found in the box which did not have the clerk's name upon the back thereof; that three of these were opened by being unfolded, and found to be straight Republican votes; thereupon the Democratic judge objected to the opening of any more of these ballots, and insisted that all of them be rejected; and this was done over the protest of the Republican judge. It appears that the Republican sheriff was unwilling to take any positive stand in the matter, and practically allowed it to go by default. It was supposed that these 26 ballots were placed in the box with the other returns of the election, but, when the trial was had, they could not be found, and no account of them or their final disposition was ever ascertained.

Before taking up the legal propositions involved in this record, we will give with more particularity some of the testimony introduced by appellants, so that it may be seen that the general statements of the facts

Digitized by Google

heretofore made is sustained by the details. The appellees did not introduce any evidence whatever. W. W. Moore, the Republican challenger at precinct "No. 2," testified positively as to the 26 ballots being considered spoiled because the clerk's name was not written on the backs as by law required, and not counted for this reason. The official certificate of the officers of election shows that 26 ballots were marked "spoiled and not counted," and as Moore's evidence could have been readily disproved if untrue, we assume, in the absence of any effort to contradict him, that what he says on the subject is true, and that the 26 ballots were not counted, alone for the reason of the absence of the clerk's name on the backs. Moore also testified, without contradiction, to a conversation between him and the Democratic clerk, R. L. Pepper, during the count of the ballots. In response to a question asked him, the witness said: "Mr. Pepper, clerk of the election, some time during the counting, asked me if I knew why there was two stencil marks put under the Democratic device, and I told him I did not, and he said, 'I do,' and I says, 'Why were they put there.' and he said 'That's the negroes we bought, and we had them to vote that way so that we would know that they had voted the way they said they would.' " We think it significant that this Democratic clerk thus in advance detailed the particulars of the corrupt bargain by which the Independent Club was bribed, as was afterwards shown by the evidence, and also that this clerk, who knew so much about the bribery that was done and included himself in it by the use of the pronoun "we," should have omitted to put his name on so many ballots when this omission, from his view of the law, would disfranchise the voters. As Pepper did not contradict or explain the conversation detailed by Moore, we accept it as true. Dan Hillman, a negro,

Digitized by Google

in response to a question about the agreement of the Independent Club, said: "The agreement was made; it was for them to stamp their ballots and stamp twice, and Joe Morrow got up that night and made a speech and told them all that was going to vote to stamp their ticket twice, and there was three or four of us present at that time, and he said that would show if they voted, and that was the understanding among all of them, and then he went around the morning of the election and told them that, if they didn't vote that way, it was lost. Q. What place on the ballot were they to stamp twice? A. Right under the rooster in the wheel." Oliver Baker, a negro, corroborated Dan Hillman on the method adopted for voting so that it could be definitely ascertained how the members voted. William Crump made this statement as to Joe Morrow, the president: "Out there at the voting precinct at Mr. White's shop, Joe says to me, 'We are going to vote 50 negroes to-day. * * *' I says: 'They won't do it.' He says, 'I'll bet you a $1 to the man, $50;' and I says, 'Well, how do you know;' and he said. 'We have two marks on them, and we can tell how they vote.' He says: 'There goes one of my men now.' He just said when the fellow came out, 'Well, you fixed it all right,' and the fellow said 'Yes,' and they went off." Dan Hillman was recalled, and said: "I was at Boaz's saloon, in Princeton, about 10 or 11 nights after the election, somewhere along there, when he (Joe Morrow) was paying off. There were 12 or 14 come after I got there—they paid off." Press Harris stated that the night before the election he attended a meeting of the Independent Club held at the room of the Democratic campaign committee; that there were about 20 of the club there; that several of the campaign committeemen, whose names he gave, were present, among whom was the

Digitized by Google

Democratic nominee for mayor. As has been said before, none of this testimony for the appellants was contradicted, although, if untrue, it was easy to disprove it. We are, therefore, forced to the conclusion that it must be accepted as true.

The 26 ballots, whose only infirmity was the absence of the clerk's name on the backs, should have been counted. In section 1471, Ky. Stats., 1903, it is provided: "No ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice." In Keller v. Ferguson, 71 S. W., 75, 24 Ky. Law Rep., 1205, on this subject, it was said: "There appear five ballots which were rejected by the election officers because not signed by the clerk. Both parties to these records have argued in support of the proposition that, where the clerk of election fails to sign his name upon the back of the ballot, as required by the statute, whether by design or through inadvertance, the ballots should not be rejected merely on account of such failure. The trial court so decided, and, in our opinion, correctly. The principle should be borne in mind that, as to duties required of the voter himself and duties required of election officers, a different rule prevails, and that, when officers of election, by neglect or fraud, fail to perform their duty, in a matter over which the voter has no control, the inclination of the courts is always that the voter shall not suffer by reason of the negligence of the officers, and, while the provision may be regarded as mandatory with regard to the officer, and his failure may subject him to punishment, it shall not disfranchise the voter who is not guilty of the violation. McCrary on Elections, sections 225 and 283; Payne on Elections, section 528." To the same effect is Herndon v. Farmer, 114 Ky. 200, 70 S. W.

Digitized by Google

632, 24 Ky. Law Rep., 1045, and Pettit v. Yewell, 113 Ky., 777, 68 S. W., 1075, 24 Ky. Law Rep., 565.

Although we have no trouble in reaching the conclusion that the 26 ballots under discussion should have been counted, inasmuch as they have been lost or destroyed it connot now be told certainly for whom they were voted, and deducting the 18 corrupt votes purchased from the Independent Club from the Democratic vote will not elect appellants. Upon this showing it is clear that appellants were not entitled to a judgment declaring them elected to the offices in question, but it remains to be ascertained whether or not the showing of fraud, which is so clearly established in this case, entitles appellants to a judgment declaring the election void, and the offices vacant. We do not believe that the omission of the clerk's name from the backs of so many of the ballots cast at precinct "No. 2" was the result of honest mistake or inadventance upon the part of that officer, and we are encouraged to reach this conclusion by the fact that this particular officer, by uncontradicted evidence, was shown to be conversant with the bribery frauds that were carried on, and by his own admission was a participant in it. An election officer, who so far forgets the sanctity of his oath as to participate in one kind of fraud at an election, can readily be believed to be willing to commit any other which the necessity of his party requires, and the opportunity of his position permits. It requires little knowledge of the methods of election frauds in modern times to appreciate how easily a close election could be turned by a shifty and resourceful clerk omitting his name from the backs of the ballots of ignorant and unwary voters, if this would suffice for the accomplishment of the evil design. Our conclusion on this subject is

Digitized by Google

strengthened by the fact that the Democratic officers at this precinct believed that the omission of the name of the clerk on the ballots would disfranchise the voter, and they tried to effectuate the fraud by actually refusing to count, or even open, the ballots lacking the clerk's signature. Deducting the 18 corrupt votes from the majority of 34, received by the Democratic ticket, would leave a majority of only 16. It is, therefore, evident that these 26 votes, which were wrongfully thrown out without being counted, could more than overcome this majority, and carry the election for the other side. Of course, as the ballots were never opened, and were either destroyed or have become otherwise lost, it cannot now with certainty be determined that appellants would have received enough of these uncounted votes to elect them. Considering the fact that the three ballots of the 26 which were opened were straight Republican votes, that the Democratic officers refused afterwards to open any others of the 26 ballots, that their infirmity was the result of a Democratic clerk's omission of duty, and the mysterious loss of the ballots themselves, we are led to the conclusion that the whole procedure with reference to them was a part of the same scheme to carry the election by fraud which was commenced before election day by the formation and purchase of the Independent Club.

In subsection 12 of section 1596a, Ky. Stats., 1903, regarding the contesting of elections as to certain offices, it is provided: "In case it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the circuit court, subject to revision by appeal, or the court of appeals finally may adjudge that there has

Digitized by Google

been no election. In such event the office shall be deemed vacant, with the same legal effect as if the person elected had refused to qualify." It would seem, then, that we have here a condition to which the language of the statute applies with full force and effect; a case where it appears from an inspection of the whole record that there has been such fraud and bribery in the conduct of the election that neither the contestants nor contestees can be adjudged to have been fairly elected. In construing this language of the statute, and applying it to a contested election, we said in the case of Stewart v. Rose, 72 S. W., 271, 24 Ky. Law Rep., 1759: "But where the illegal voting, the bribery or fraud or intimidation has prevailed so that its effect upon the result is such that no degree of certainty exists as to the fairly expressed will of the electors, the election should be declared void. The voters of the district or community affected by it are entitled to an opportunity, by a fair election, to select their officials. It is of the first importance to the people that their rights, before the claims of rival candidates, be protected and preserved." The same principle is recognized in Wilkins v. Duffy, 114 Ky. 111, 70 S. W. 668, 24 Ky. Law Rep., 21, 913, 968. It cannot be successfully maintained, that the contestees under the charter of cities of the fourth class can be held to be judges of their own election. It is true, in sec. 3486, Ky. Stats., 1903, it is provided: "It (the board of council) shall judge of the eligibility and election returns of its members" * * * —but it is manifest that this should have no application to a case like the one under discussion. It never was the law that one could be a judge of his own case. At common law all such judgments were void, as they must be held under every rational system of judicature or governmental policy. No statute should be construed

Digitized by Google

to mean what would be absurd, and what could be more absurd than the submission to a board of councilmen of the question whether they, or their opponents, had been legally elected? This proposition needs no citation of authority, but, in the case of Keller v. Ferguson, supra, there was involved the election of councilmen for Georgetown, Ky., a city of the fourth class, as is Princeton, and in that case this court took jurisdiction of the contest between the rival candidates, and reversed the judgment of the circuit court on the question.

In reaching the conclusion that the election involved in this case should be held void, and the offices claimed by the parties litigant vacant, we are not unmindful of the force of the argument that courts ought not, for light and trivial causes, undo the work of the officers having in charge elections by the people. On the other hand, we appreciate the importance to the people of a watchful supervision on the part of the courts to enforce all those statutory safeguards which the representatives of the people have provided to circumvent the machinations of those who, by fraud or intimidation, seek to render abortive their will as expressed at the polls. Nor must it be forgotten that an election tainted with fraud or controlled by intimidation or violence is not an election by the people, but one held despite them. The people of Kentucky have not been unmindful of the blessings certain to flow to them from that right of a free and equal election so sacredly preserved in their Bill of Rights, and therefore, they have devised a system of laws which, if honestly followed and enforced, secures to every deserving citizen the right to cast his ballot in accordance with his will and choice, and have it counted as cast. Nor have they, on the other hand, been unappreciative of the evils certain to flow from

Digitized by Google

elections which are not "free and equal," and they have provided a system of pains and penalties which, if rigorously and intelligently applied, insures the swift and condign punishment of every violator of the right of the people to govern themselves by free and equal elections. Our election laws are, therefore, among the most, if they are not the most, important of all the statutes which safeguard the rights of the people. Whenever elections are not free and equal, the democratic principle is dead, and republican form of government will exist only in name. A people may lose their liberty while retaining the name and form of democracy. The freedom of republican Rome was lost in the despotism of the empire when, by law, it was death even to suggest a return to monarchy, and of a great and highly civilized people it has been eloquently said, in contrasting their civilization with that of the English: "And, although they attempted to introduce into their country municipal institution, all such efforts were futile, for, while they copied the forms of liberty, they lacked that bold and sturdy spirit by which alone liberty can be secured. They had, indeed, its image and superscription, but they wanted the sacred fire that warms the image into life. Everything else they possessed. The show and appliances of freedom were there. Charters were granted to their towns, and privileges conceded to their magistrates. All, however, was useless, for it is not by the wax and parchment of lawyers that the independence of men can be preserved. Such things are the mere externals. They set off liberty to advantage; they are as its dress and paraphernalia—its holiday suit in times of peace and quiet. But, when the evil days set in, when the invasions of despotism have begun, liberty will be retained, not by those who can show the oldest deeds

Digitized by Google

and the largest charters, but by those who have been most inured to habits of independence, most accustomed to think and act for themselves. * * *" Buckle's History of Civilization, vol. 1, p. 448. It is, therefore, of the highest importance that the courts should scan the conduct of elections with deep interest and jealous care, and enforce with vigor the laws provided for discouraging fraud and violence. One of the most important parts of these laws is the statute under consideration, which enables the courts to deprive the candidate apparently elected of the fruits of fraud when this is established, although the office cannot be given to his opponent. It is not often that fraud is so surely entangled and held in the meshes of its own chicanery that it can be definitely measured, or its influence accurately weighed, but generally diligence will so expose its insidious work as to justify the courts in withholding the fruits of its evil doing, and thus depriving it of its highest incentive. And, if this be not done when the facts justify it, then elections will become simply contests of fraud and violence, and the political boss will come into his own. "By merit raised to that bad eminence." Then will come a time when to this newly made ruler we may apply (mutatis mutandis) the language of the historian in picturing the greatest demagogue who ever ruled by fraud and violence: "He understood the fearful and sinister secret of how men may be robbed of their property by writing the word 'jury' into their laws. How a nation may be snared by universal suffrage; and the liberty of a people strangled in the nighttime with a thing he called an election." Those who believe in the perpetuity of government by the people must rest their hopes in the virtue of the people, and, unless this vitalizing principle is unshackled in its exercise, such government cannot

Digitized by Google

exist, and it matters little whether, in speaking of the mere machinery of a government which has lost the spirit of liberty although retaining its outward semblance, we use the word "Czar" or "Governor," "Douma" or Legislature," Ukase" or "Statute," "Cassock" or "Policeman," the practical result is the same, for absolutism has been attained.

The judgment is reversed, with directions to the trial court to enter a judgment holding the election void and the offices vacant.

JUDGE NUNN—Dissenting.

If there was sufficient fraud to invalidate the election, which I doubt, there is not the slightest evidence that the appellees had any knowledge of or took any part in it. For this reason I dissent.

CASE 93.—ACTION BY ALEXANDER CRAWFORD'S ADM'R AGAINST THE TRAVELERS' INSURANCE CO. OF HARTFORD, CONN., ON AN ACCIDENT INSURANCE POLICY.—February 26.

Crawford's Adm'r v. Travelers' Ins. Co. of Hartford, Conn.

124 733
f135 292

Appeal from Nelson Circuit Court.

SAMUEL E. JONES, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Reversed.

1. Life Insurance—Authority of Agent—Scope of Employment—An insurance company is liable for the acts of its agent while acting in the apparent scope of his authority, and the knowl-

Digitized by Google

edge of the agent is imputed to the company respecting any fact material to the risk, and the company is estopped from setting it up in defense unless the party dealing with the agent knew that the agent had limited power, and that he was exceeding the power conferred upon him by his principal.

2. Same—Age Limit—Knowledge of Agent—Ignorance of Purchaser—Question for Jury—Where an agent of a life insurance company sold a ticket to an applicant over sixty-five years of age for an accident policy on his life for twenty-four hours, and the purchaser was killed by accident within the twenty-four hours, the company is liable for the amount of the insurance named therein, provided the agent knew the purchaser was over sixty-five years of age, and that the purchaser did not know that the policy contained a clause making it void as to persons under eighteen years and over sixty-five years of age, which should have been submitted to the jury.

JOHN S. KELLY for appellant.

JOHN A. FULTON for appellee.

(No briefs—record out of office.)

OPINION OF THE COURT BY JUDGE NUNN—Reversing.

The judgment appealed from was rendered by the Nelson circuit court in an action instituted by the appellant against the appellee to recover $5,000 on an accident insurance policy issued to Dr. Alexander Crawford, appellant's intestate. On the trial, after the introduction of testimony by both parties, the court gave the jury a peremptory instruction to find for defendant, and of this ruling the appellant now complains.

The policy was sold to Dr. Crawford by the agent of appellee on September 23, 1904, which insured him against accidental death for a term of 24 hours. Within that time he was killed by reason of a collision of two trains, on one of which he was riding. In its answer appellee relied solely upon the following clause in the policy, to-wit: "This ticket, and the

Digitized by Google

insurance thereunder, shall be wholly void as to persons under 18 and over 65 years of age." It is alleged that Dr. Crawford was over the age of 65 years at the time he purchased the ticket or policy, that he failed to disclose that fact, and for this reason appellee was not bound to pay the policy. The appellant, in reply, admitted that Dr. Crawford was over the age of 65 years at the time; but alleged that the agent of appellee who sold him the ticket knew that fact, and that his intestate did not know that the ticket or policy contained such a clause. The appellee, by rejoinder, controverted, the affirmative matter in the reply, and for the first time questioned the authority of the agent of appellee on selling the ticket to waive any provision of it. It is not necessary to consider the effect of this plea in rejoinder; for, as we understand the briefs of counsel, the question of the limited powers of the agent, who sold the ticket, is abandoned. But, if not, the principle is so well settled that such an agent, while acting in the apparent scope of his authority, will bind his principal as firmly as could its general officer while acting in that capacity. His knowledge, therefore, respecting any material fact which affects the risk is imputed to the company, and it is estopped from setting it up in defense unless the party dealing with the agent knew of his limited power, and that he was exceeding the power conferred upon him by his principal. See May on Insurance, sec. 143; Phoenix Insurance Co. of Brooklyn v. Phillips, 16 Ky. Law Rep., 123; German Insurance Co. v. Hart, 16 Ky. Law Rep., 346; Phoenix Insurance Co. v. Spiers & Thomas, 87 Ky., 285, 10 Ky. Law Rep., 254, 8 S. W., 453; London & Lancashire Fire Insurance Co. v. Gerteisen, 51 S. W., 617, 21 Ky. Law Rep., 471; Teutonic Insurance Co. v. Howell, 54 S. W., 852, 21

Digitized by Google

Ky. Law Rep., 1245. J. Tyler Davis was the agent of appellee in the district which included Nelson county. He left these tickets or policies in the hands of B. J. Hubbard prepared to be delivered to purchasers; Hubbard only having to insert the date and the name of the purchaser of the ticket. The facts of this case are similar to the facts of the London & Lancashire Fire Insurance Co. v. Gerteisen, supra. In that case the court said: "It is also well settled that knowledge of the agent who represents the company in the transaction is the knowledge of the company. It is insisted, however, that Rudd alone was appellant's agent, that Haws had no authority from it, and that it is not chargeable with facts known to Haws, unless communicated to Rudd. This is the decisive question in the case. According to the testimony, Haws was in effect the partner of Rudd in effecting this insurance. The rule that a delegated authority cannot be delegated has some limitations. It is usual for insurance agents who issue policies to send out solicitors to take applications on which the policies may be issued; and authority to do so may be inferred, nothing appearing to the contrary, for this is the common way the business is done. When Haws came to appellee professing to be an insurance agent, and took his application and obtained for him the policy of insurance, he had a right, without notice of a defect in his power, to regard him as the agent of the company for this purpose, and appellant, by accepting the application, issuing the policy and keeping the premium, is estopped to say his act was unwarranted, and must take the benefit with the burden."

In the case at bar Hubbard, the agent who sold Crawford the ticket, stated in effect that he knew at the time he sold the ticket that Crawford was over

Digitized by Google

the age of 65 years. J. Tyler Davis testified that about a week before the sale of this ticket Dr. Crawford came to him in a certain drug store in the town of Bardstown, and applied to him for the purchase of a ticket of insurance, and he informed him at the time that his company would not insure persons over 65 years of age; but there was no proof introduced showing that Dr. Crawford knew at the time he purchased the ticket sued on that it was a policy or ticket in the company that J Tyler Davis represented. Hubbard testified that, when he sold Crawford the ticket, the train on which he (Crawford) took passage was about due, and that Crawford received the ticket, put it in his pocket, and started to the train. Under these facts, in our opinion, there was sufficient evidence to authorize the court to submit the case to the jury. It was error to give a peremptory instruction. In the case of Travelers' Insurance Co. of Hartford v. Ebert, 47 S. W., 867, 20 Ky. Law Rep., 1009, the court said: "It is evident that the agent was authorized to issue accident policies of some kind, and it nowhere appears that appellee had any notice or information to the effect that his power in that respect was limited; hence we are of opinion that appellant is bound by the representations and contracts in respect to insurance made by an agent authorized to make any contract of insurance. It would be unreasonable to expect the community at large to be cognizant of the authority and restrictions which an insurance company might impose upon an agent, and we deem it no more than reasonable and just that appellant should be bound by the contract and representations of its agent in respect of the kind of insurance sold to the appellee, and for which the agent received pay." In the case of Standard Life & Accident Insurance Company v. Holloway (Ky.), 72 S. W. 796, 25

Digitized by Google

Ky. Law Rep. 1856, the insured was crippled, and the policy contained the provision avoiding it as to cripples, just as in the case at bar the provision makes it void as to persons over 65 years of age. The court held that it was proper to submit to the jury for its determination, under the evidence, whether the agent who issued the policy had knowledge of the insured's crippled condition. The court in that opinion said: "So, in view of the authorities referred to, we are constrained to hold that if Rogers, appellant's agent, at the time he delivered to appellee the policy sued on, knew that he was maimed or crippled, the provision in the policy intended to exclude cripples was waived in this case; and we think appellant is estopped to deny the waiver. It was for the jury to determine from the evidence presented whether the agent had such knowledge or not, and, though he denied having any knowledge thereof, appellee testified that he walked in before him with his usual limp, and that upon reaching the ticket office window he laid his cane upon the base or shelf thereof in plain view of the agent. From these facts the jury doubtless found that the agent saw, and had opportunity to know of, appellee's crippled condition; and, upon the other hand, that the latter did not know, and had no means of learning, of the provision of the policy intending to exclude persons of his class from its benefits, as he took the passenger train immediately after receiving it for the purpose of going to Louisville."

We are of opinion under these authorities that it was proper for the court to submit to the jury the question of the agent's knowledge as to the age of the insured; and, if at the time the policy was issued he knew that the insured was over the age of 65 years, that then the company was bound, unless the jury

Digitized by Google

believe from the evidence that Dr. Crawford at the time knew that the agent was exceeding his authority.

For these reasons, the judgment of the lower court is reversed, and the cause remanded for further proceedings consistent with this opinion.

CASE 94.—ACTION BY LENA SCOTT FLOOD'S TRUSTEE AGAINST SCOTT BROTHERS FOR RENT.—February 27.

Scott Bros. v. Flood's Trustee

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

Judgment for plaintiff. Defendants appeal. Reversed.

1. Landlord and Tenant—Fire on Leased Premises—Abatement of Rent.—Ky. Stats., 1903, sec. 2297, provides that, unless a tenant otherwise contract, he shall not be liable for rent for the remainder of his term of any building leased by him and destroyed during the term by fire without his fault. Held, that where a group of buildings was leased, one of which was destroyed by fire during the term of the lease, without the fault of the tenant, he was entitled to abatement of the rent in the proportion that the rental of the building destroyed bore to the whole rent agreed to be paid.
2. Same.—A provision, in a lease of two buildings, that, if the leased premises are rendered untenantable by fire or unavoidable accident, the lessee may surrender the lease, does not provide for a partial destruction of the premises, not rendering them untenantable, but only less valuable, and does not render inapplicable Ky. Stats., 1903, sec. 2297, relieving a tenant from liability for rent for the remainder of his term,

Digitized by Google

where any building leased by him is destroyed by fire without his fault.

MORTON, WEBB & WILSON, attorneys for appellants.

Our contention is that a building is none the less leased if it be included in a group of buildings leased, nor is it any the less leased, even if the amount of rent be not fixed in terms by the lease. (Kentucky Statutes, sec. 2297; Sun Insurance Co. v. Varble, Receiver, 103 Ky., 758.)

ALLEN & DUNCAN for appellee.

POINTS AND AUTHORITIES.

1. The statute applies both to a lease of a single building and to a lease of a group of buildings.

2. Under a lease of a single building the tenant should be relieved of his agreement to pay rent whenever the building is damaged by fire. It is not necessary that the property should be totally destroyed.

3. Under a lease of a group of buildings a total destruction of all the buildings is not necessary in order to discharge the tenant from his liability to pay rent, but he is equally discharged whenever any one or more of the buildings are either damaged or destroyed.

4. The tenant can never avail himself of the statute, whether the lease be of a single building or a group of buildings, unless the damage or destruction is such as to materially affect the value of the property to the lessee. A very slight damage will not discharge him.

5. Whether the lease include one building or a group of buildings the tenant in order to avail himself of the statute must surrender possession of the entire property.

6. Whenever the lease embraces a group of buildings and the rent of any one or more of the buildings has been separately stipulated or fixed, the tenant in the event such building or buildings are damaged or destroyed is relieved from his liability for the rent of such building or buildings as fixed by the lease, and cannot be required to surrender possession of the remainder of the buildings. To avail himself of the statute it is necessary only that he surrender possession of the property on which stood the damaged or destroyed buildings.

7. There can be no difference in principle so far as the construction of the statute is concerned between a lease of a single building and lease of a group of buildings. In either case the

Digitized by Google

rights and liabilities are the same. Therefore if in case of a lease of a single building the tenant in order to avail himself of the statute must surrender possession when the building has been partially destroyed, then it follows necessarily that in case of a lease of a group of buildings, and one building is damaged or destroyed, the lessee must surrender possession of the entire premises leased. If he elects to retain possession in either case he must pay the stipulated rent.

8. The statute has been construed by this court and the question at bar decided in the case of Thomas v. Conrad, 114 Ky., 841. That case must be overruled if the present opinion is to stand.

9. The object of the statute was merely to relieve the lessee of the onus of the common law rule. It was not intended to place new burdens on the lessor. The effect of the court's interpretation of the statute is to visit upon the lessor a serious hardship.

10. In the case at bar the destruction of the main warehouse undoubtedly gave the appellants the right to surrender the property and cancel the lease. By refusing to surrender and electing to retain possession they were bound to pay the stipulated rent.

11. The following cases cited by the court as authorities for its decision examined and found, as we think, not to be in point: (Wattles v. South Omaha C. & I. Co., 50 Neb., 251, 35 L. R. A., 424; Taylor v. Hart (Miss.) 30 L. R. A., 716; Whitaker v. Hawley, 25 Kan., 674, 37 Am. Rep., 277.)

12. The following cases support the construction of the statute for which we contend: (Arbenz v. Exley, Watkins & Coir, 62 W. Va., 476, 61 L. R. A., 957; Roach v. Peterson, 47 Minn., 291, 50 N. W., 80, 601; Gay v. Davey, 47 Ohio State, 396; Johnson v. Oppenheim, 55 N. Y., 280; Smith v. Kerr, (N. Y.) 108 N. W., 31, 2 Am. St. Rep., 362.)

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Reversing.

In February, 1903, the appellants leased for 23 months, from the Security Trust & Safety Vault Company, of Lexington, as trustee of appellee, a lot in the city of Lexington, known as "Scott's Factory," upon which there was located four buildings—two designated as hackling houses, and two as warehouses. Appellants agreed to pay as rent for the premises

Digitized by Google

$75 each month. It was provided in the lease that "said second party (appellants) is to take good care of said premises and return the same in as good condition as when received by said second party from said first party, ordinary wear and accident by fire and the elements and other unavoidable accidents excepted. If destruction as aforesaid, total or partial, ensue, so as to make the premises untenantable for the purposes designated, the lessee may surrender and cancel this lease." At the expiration of the lease it was renewed on the same terms for one year, beginning January 1, 1905, and ending January 1, 1906 On the 3d day of March, 1905, one of the warehouses upon the premises, without neglect or fault on the part of appellants, was totally destroyed by fire. Apellants refused to pay the full rent for the months of March, April, May, June, and July, 1905, and appellee, in August, 1905, caused to be issued for the rent in arrears a distress warrant against them, which was levied upon certain personal property. Appellants, by the execution of a bond under section 645 of the Civil Code of Practice, suspended a sale of the property under the warrant. A notice was given, under section 648 of the Civil Code of Practice, that motion for a judgment upon the bond would be made. Thereupon appellants filed an answer, setting up that the warehouse destroyed was the larger of the two buildings upon the premises used as warehouses, and that the fair rental value of the warehouse destroyed was $50 per month, estimated upon the basis that the fair rental value of the entire premises was $75 per month, and that the rent agreed to be paid should be abated during the term $50 per month. To this answer a demurrer was sustained. Thereafter another distress warrant was issued for the rent that accrued subsequent to the issual of the first warrant, and the same

Digitized by Google

proceedings had as were taken under the first warrant. The two proceedings were consolidated, and appellants filed an amended answer, averring that, in addition to the facts stated in their original answer, the destruction of the warehouse, although it seriously inconvenienced appellants and reduced the scope of their business, did not render the leased premises untenantable for the purpose of conducting the business in which they were engaged or the business for which the premises were leased, and that the rent should be abated in the sum of $500 for the year, because of the destruction of the building and consequent loss of its use to appellants. To this pleading a demurrer was also sustained, and judgment rendered for the full amount of the rent.

The question to be considered is: Is a tenant entitled to an abatement of the rent he contracted to pay, if the buildings or any of them on the leased premises are destroyed by fire or other cause without fault or neglect upon the part of the tenant? Previous to the enactment of section 2297 of the Kentucky Statutes of 1903, it was the rule in this State that a tenant, in the absence of a contract to the contrary, was bound to pay the rent for the term, although the premises might be destroyed by inevitable casualty, and without his fault or neglect. Helburn v. Mofford, 7 Bush, 169. To relieve tenants from this harsh and unreasonable rule of the common law, the Legislature in 1893 enacted what is now section 2297 of the Kentucky Statutes of 1903, providing that, "unless the contrary be expressly provided for in the writing, no agreement of a lessee that he will repair, or leave the premises in repair, shall have the effect of binding him to erect similar buildings, if without his fault or neglect the same may be destroyed by fire or other casualty, nor shall a tenant, unless he otherwise con-

Digitized by Google

tracts, be liable for the rent for the remainder of his term of any building leased by him, and destroyed during the term by fire or other casualty without his fault or neglect." It is the contention of appellee that this statute has no application to a rental contract that covers more than one building, unless the rent for each building is separately fixed in the writing; that where, as in this case, a group of buildings is rented for a fixed sum, the loss of one, or any less number than the whole, however material the ones destroyed might be, will not exonerate the tenant from the payment of the rent named in the contract; that the statute only protects the tenant when a single building rented is destroyed, or when, if more than one building is leased, the rent of each is separately stipulated.

In this view we are unable to concur. The purpose of the statute was to change the rule of law in force before its passage. It was designed to protect the tenant from the operation of a law that imposed upon him an unreasonable burden, and it should be so interpreted as to fairly carry out the intention of its enactment. If the construction contended for by appellee should prevail, the tenant who leased for a term a group of five buildings, equally useful and valuable to him, would be required to pay the rent stipulated in the contract, although four of the buildings were destroyed by inevitable casualty the day after the rental contract was entered into. To put it in another way: The statute would be limited in its operation to cases where all of the buildings leased were destroyed, and would afford no protection to the tenant in any other state of case, however serious the loss sustained by him might be. This construction would virtually destroy the usefulness of the statute, or so impair it that it would afford little benefit or protection to the

Digitized by Google

lessee. If a group of buildings are leased, and one or any less number than the whole are destroyed by fire, the tenant is entitled to an abatement of the rent in the proportion that the rental value of the buildings destroyed bear to the whole rent agreed to be paid. Of course, when one or more of several buildings have been destroyed, the landlord has the right of entry for the purpose of repairing or replacing them, and if the tenant denies this right, or interferes with it, he should be required to pay the full rent agreed upon. And if the landlord, before the expiration of the term, replaces the building destroyed by one equally as useful to his tenant, he may, after its completion, require the tenant to pay the rent fixed in the contract. If the landlord does not choose to restore the building, the use of which has been destroyed, or erect a new one in its place, the only loss he suffers is the deprivation of the reasonable rent of the building during the term. Nor will the tenant be permitted to use the land upon which the building destroyed was located without paying reasonable compensation for its use. The statute does not impose any obligation upon the landlord that he has not voluntarily assumed in the lease. It does not compel him to restore the building destroyed. Its sole purpose was to protect the tenant, or, rather, to relieve him from the payment of rent of buildings when their value to him have been totally destroyed without his fault or neglect. The statute in question has not heretofore been construed by this court, but similar statutes have received the consideration of other courts of last resort. Thus, in Wattles v. South Omaha C. & I. Co., 50 Neb. 251, 69 N. W. 785, 36 L. R. A. 424, 61 Am St. Rep. 554, it was held that, where a substantial portion of leased premises is destroyed without the fault of the lessee, he is entitled to an

Digitized by Google

apportionment of the rent covenanted to be paid and accruing thereafter, in the absence of an express assumption by him of the risk of such destruction. In Taylor v. Hart, a Mississippi case reported in 18 South, 546, 30 L. R. A. 716, and Whitaker v. Hawley, 25 Kan. 674, 37 Am. Rep. 277, questions similar to the one here involved were under consideration, and a conclusion reached in harmony with the views here expressed.

The lease provides that, if the premises are rendered untenantable by fire or unavoidable accident, the lessee may surrender and cancel the lease; and it is contended for appellee that the statute has no application to this case, but the rights of the parties are fixed and determined by the terms of the lease. We do not so construe the clause in question. If the premises had been rendered untenantable, then under the provisions of the lease the lessee had the option of surrendering the premises and having the lease canceled. But the lease does not provide for a condition of affairs involving a partial destruction of the premises, or such an injury to them as would render them less valuable to the lessee without being untenantable. The answer, to which a demurrer was sustained, avers that the destruction of the building did not render the premises untenantable, and, as the lease does not provide for the contingency that actually happened, it follows that the statute is applicable.

Wherefore, the judgment of the lower court is reversed, with directions to proceed in conformity with this opinion.

Petition for rehearing by appellee overruled.

Digitized by Google

CASE 95.—PROSECUTION AGAINST JAMES BAST FOR MURDER.—February 27.

Bast v. Commonwealth

Appeal from Anderson Circuit Court.

R. F. PEAK, Circuit Judge.

Defendant convicted of murder and appeals. Affirmed.

1. Criminal Law—Instructions—Principals and Accessories.—Where accused was charged as principal and the court directed the jury to find him guilty as a principal or to acquit him, the court did not err in failing to give a peremptory instruction in his favor because the proof showed that, if guilty at all, it was as an accessory before the fact.
2. Same—Insanity—Homicide.—Where the plans laid by accused and another for the murder of deceased showed conclusively that he was not a man of insane mind, and that he fully realized that the act he was about to commit was wrong, the court properly refused to charge on insanity.
3. Homicide—Instructions—Defenses—Alibi—Insanity—Where, in a prosecution for homicide, defendant pleaded insanity and an alibi, and there was evidence justifying the jury in disbelieving the testimony with reference to alibi, an instruction that if the jury believed beyond a reasonable doubt that defendant unlawfully, feloniously, willfully and with malice aforethought, and not in his necessary or apparently necessary self-defense, shot deceased, from which shooting deceased then and there presently died, the jury should find defendant guilty of murder, etc., was proper.
4. Criminal Law—Accessories—Inducement.—Where defendant was present, encouraging, assisting, and advising another in killing deceased, the law presumes that defendant's presence, etc., "induced" the commission of the act.
5. Homicide—Self-Defense—Manslaughter.—Where, in a prosecution for homicide, it appeared that defendant and another

Digitized by Google

conspired to kill deceased, and that they approached him unawares and shot the top of his head off while he was lying asleep in his home, and that deceased's death was instantaneous, defendant was not entitled to an instruction on self-defense or on manslaughter, either voluntary or involuntary.

CARROLL & CARTER and L. T. CARTER for appellant.

N. B. HAYS, Attorney General and CHAS. H. MORRIS for Commonwealth.

OPINION OF THE COURT BY JUDGE LASSING—Affirming.

James R. York was assassinated at his home in Anderson county, Ky., some 4 1-2 miles from Lawrenceburg, on Friday, August 18, 1905. In September, 1905, the grand jury of Anderson county returned an indictment against W. H. York and James Bast, charging them jointly with murder. The indictment is as follows: "The grand jurors of the county of Anderson, in the name and by the authority of the commonwealth of Kentucky, accuse William H. York and James Bast of the crime of willful murder, committed in manner and form as follows, to-wit: The said William H. York and James Bast, in the said county of Anderson, before the finding of this indictment, with force and arms, unlawfully and feloniously, willfully and with malice aforethought, did amongst themselves conspire, confederate and agree to kill and murder James R. York, and afterwards, to-wit, on the 18th day of August, 1905, in the county aforesaid, in pursuance of and according to the conspiracy, combination, and agreement amongst themselves had as aforesaid, did willfully, feloniously, and with malice aforethought, kill and slay and murder the said James R. York by shooting and wounding him, the said James R. York, with guns and pistols,

Digitized by Google

deadly weapons, loaded with powder and leaden bullets and other hard and deadly substances, from which shooting and wounding, he, the said James R. York, then and there presently died. Against the peace and dignity of the commonwealth of Kentucky." James Bast, the appellant herein, demanded a separate trial, and, at the January term, 1906, of the Anderson circuit court, he was tried, found guilty, and his punishment fixed at life imprisonment in the penitentiary. Because of several alleged errors occurring during the progress of the trial he prosecutes this appeal.

Under the plea of "not guilty," the appellant's testimony was directed towards establishing an alibi, and also in support of the plea of insanity. It is contended by counsel for appellant that, if guilty of any criminal connection with the assassination, it was that of "an accessory before the fact," and that the court erred in not giving a peremptory instruction. for the reason that he was not charged in the indictment with being "an accessory before the fact." This contention is answered by the statement that he is charged in the indictment with being a principal, and the court in its instructions directed the jury to find him guilty as princpal, or not at all. No instruction was given to the jury that they might find him guilty of being "an accessory before the fact." The peremptory instruction asked for by appellant was properly overruled, for appellant was charged with the murder of James R. York, and it was the province of the jury to say, under the plea of appellant, and the proof offered, as to whether or not he was guilty of that charge. Appellant also complains that the court erred in not instructing the jury on the question of insanity. We have given the record a most careful consideration, and have weighed all of the testimony offered by appellant upon this question, and the record does

Digitized by Google

not disclose a particle of evidence that appellant was or ever had been insane. It is true that he was shown to have been subject to epilepsy. A majority of the witnesses, in fact, all of them, testified that appellant, though not a man of strong will power, had sufficient mind to distinguish right from wrong. No witness testified that he was of unsound mind, though all agreed that he was of weak mind and easily influenced, and while the physicians testified that epilepsy, when extending over a long period, has a tendency to weaken the mind, as it doubtless did in this case, yet none of them say that it had weakened the mind of appellant to such an extent as to cause him to lose control of his actions, or that he was unable to distinguish right from wrong. In the case of Fitzpatrick v. Commonwealth, 81 Ky. 361, 5 Ky. Law Rep. 363, when discussing this question, this court said: "There is no law which will excuse or palliate a deliberate murder, on the ground that the perpetrator of it is unlearned, passionate, ignorant, or even of weak mind, unless the weakness of mind amounts to such a defect of reason as to render him incapable of knowing the nature and quality of his act, or, if he does know it, that he does not know it is wrong to commit it."

In the case before us the proof shows that the accused did know that it was wrong to murder. He understood and realized this fully, as much so perhaps as any man of ordinary intelligence would have, and that he did so realize it is evidenced by the fact that it was planned by the accused and William H. York that the life of James R. York should be taken at a time and in a way so as to avoid the possibility of detection. The plans, as described by the accused, show conclusively that he was not a man of unsound mind, and on this showing and on this proof, the trial

Digitized by Google

court properly refused to give an instruction on the question of insanity. The accused also complains of instruction No. 4, which is as follows: "If the jury believe from the evidence beyond a reasonable doubt. that the defendant, James Bast, in Anderson county, before September 9, 1905, unlawfully and feloniously, willfully and with malice aforethought, and not in his necessary or apparently necessary self-defense, shot James R. York, with a gun loaded with powder and leaden bullets, or other hard and deadly substances, from which shooting, he, the said James R. York, then and there presently died, you should find the defendant guilty as charged, and fix his punishment at death or confinement in the penitentiary for life in their discretion." The accused was charged in the indictment with having killed him. The proof tended to show that he had planned to kill him, and it was for the jury to say from the evidence whether or not he did kill him. The testimony discloses the fact that for more than two years the accused had been planning with William H. York, brother of the deceased, to take the life of the deceased; that the accused had upon, at least, two occasions, attempted to procure another person to take the life of James R. York; that these conversations relative to the taking of the life of James R. York had been frequent, there is no doubt; that the purpose for which he was to be killed was to enable William H. York to come into possession of his property, in which the accused was to some extent, at least, to share. On Tuesday night before the killing the plans were perfected, by which James R. York was to be killed on Friday. It was known to the accused and William H. York that on Friday William Wallace and his family, who lived with James R. York, would attend the Lawrenceburg fair, and this would leave James R. York at home

Digitized by Google

alone. Accused was to meet William H. York in the forest, not far from the residence of James R. York, on Friday morning. He was to bring with him a single-barrel shotgun, which was to be used in killing James R. York in the event that William H. York failed in his efforts to secure a double-barrel shotgun. This agreement on the part of the accused he admits having carried out in part. Armed with a single-barrel shotgun, he was in the neighborhood, where he had agreed to be, early on the morning of the day upon which James R. York was assassinated. Not only did he admit this, but several witnesses testified to having seen him in that neighborhood with a gun of the character described. William Wallace and his family left home, and started for the fair about 11 o'clock on Friday morning, leaving James R. York alone in the house. They returned in the evening about 6 o'clock, and found him lying upon a couch or sofa in the hall, with the entire top of his head blown off. He was killed some time between 11 o'clock in the morning and 6 o'clock in the evening, and, from the testimony given by the coroner, it is evident that he was killed nearer 11 o'clock than he was to 6 o'clock, as the body had become somewhat rigid at the time it was examined by the coroner. The accused shows by several witnesses that he was seen going along the road from a point beyond the lane leading to the home of James R. York toward Lawrenceburg and that he arrived in Lawrenceburg about 11 o'clock, These witnesses, however, did not agree as to the time of the day at which he was seen by them. Some, who evidently saw him when he was further from town than the point at which he was seen by others, fix the time at two hours later in the day than the others say he was seen nearer the town. A son of the accused, who was sick

Digitized by Google

at the time, testified that his father was at home on that day from 11 o'clock until half-past two. The accused having admitted to others that he had planned to kill the deceased in a most deliberate and cold-blooded manner, and the fact that he was seen in that neighbrohood on the morning upon which deceased was killed, armed, as he admits he had agreed to arm himself, for the purpose of killing deceased, and deceased having been killed upon that day, and the accused upon being charged with the murder having attempted to establish the fact that he was not there when the murder was committed, it was certainly the province of the jury to say, under the proof offered, whether or not the alibi had been established to their satisfaction, and instruction No. 4 was proper under the facts proven. If the jury refused to believe the little son of accused, then there was absolutely no testimony to establish the whereabouts of accused from half-past 10 or 11 o'clock in the day until he was seen at the fair ground, between 3 and 4 o'clock. He would have had ample time to go back to where James R. York lived and commit the crime, and return to Lawrenceburg between 11 a. m. and 3 p. m., when he is next accounted for by his presence at the fair.

Appellant also complains of instruction No. 5, because it failed to tell the jury that, although they might believe from the evidence that the accused was present and encouraged, and assisted, and advised William H. York to shoot and kill James R. York, yet, unless they further believed that William H. York was thereby induced to do the killing, they should find him "not guilty." This, however, is not sound, for the law presumes that when one is present encouraging, assisting, and advising another to do an unlawful act, the one so acting is induced by the pres-

Digitized by Google

ence and encouragement of the other to commit the act. From the very fact that he is present encouraging and advising the commission of the act the law presumes that such presence, encouragement, advice. and assistance induces the commission of the act in a case like this. Appellant's next, and we apprehend his chief, objection is that the trial court failed to give to the jury instructions on manslaughter, voluntary and involuntary, and on self-defense, and, in support of his contention on this point, he relies upon the cases of Messer v. Commonwealth, 90 S. W. 955, 28 Ky. Law Rep. 920; Ratchford v. Commonwealth, 28 S. W. 499, 16 Ky. Law Rep. 411; Rutherford v. Commonwealth, 13 Bush 608; and Buckner v. Commonwealth, 14 Bush, 601.

In the case of Messer v. Commonwealth, first reported in 76 S. W. 331, 25 Ky. Law Rep. 700, the accused himself testifies that he killed deceased, but alleged that it was done accidently, and under the facts proven; and in the testimony the court said that an instruction should have been given upon the subject of involuntary manslaughter, and that it was error in the court in failing to do so. On the second appeal of this case, found in 85 S. W. 722, 27 Ky. Law Rep. 527, this court held that the trial court erred in failing to give an instruction on self-defense, for, while the plea of the accused was that the killing was done accidentally, yet the theory of the commonwealth was that the accused had killed deceased while carelessly and recklessly handling a pistol, with knowledge of its danger to those about him, and there was proof in the case to the effect that the accused had sustained unlawful relations with the deceased; that they had had previous troubles, neighbors had heard screams coming from the direction of her house on a previous occasion, and the accused had said that she

Digitized by Google

had driven him from her home, and that the matter was not over, or words to that effect. And on the third appeal of this case, found in 90 S. W. 955, 28 Ky. Law Rep. 920, the appellant complained of the action of the court in giving to the jury an instruction on self-defense when his contention was that he had killed deceased accidentally, and this court, in passing upon that question, said: "In giving the instruction in question, we assume that the trial judge was following the rule so repeatedly announced by this court that where no eyewitness to the homicide testifies as to the facts thereof, it is the duty of the court to give an instruction on the law of self-defense."

In the case of Ratchford v. Commonwealth, 28 S. W. 499, 16 Ky. Law Rep. 411, the dead body of Bud Finn, with two gunshot wounds in the left thigh, his head crushed in, and his brains knocked out, was found near the city of Falmouth, A number of loose and bloody stones were lying about, and the ground bore evidence that there had been a fierce struggle between the decedent and his antagonist. The accused, Ratchford, was arrested, charged with murder, was thereafter indicted and convicted. The testimony was purely circumstantial. There was no eyewitness to the transaction. Upon appeal to this court, it was held that under the plea of "not guilty," although the accused testified that he was not at the place of the killing, and did not commit the act, yet, where there is no proof showing the facts attending the killing, the law applicable to murder, manslaughter, and self-defense must be given, although the court in this case said: "Ordinarily the instructions must conform to the proof and be suggested by the proof."

In the case of Rutherford v. Commonwealth, 13 Bush, 608, this court held that where there was no

Digitized by Google

eyewitness to the killing, the law applicable to murder, manslaughter, and self-defense should be given, in order to meet any state of facts the jury may find from the circumstances in evidence to have existed. In this case the facts are not fully stated, but we gather from the opinion that there was conflicting evidence on the question as to whether or not there had been previous trouble between the families of accused and deceased, and there being no one present at the killing, the jury were left to judge from the facts and circumstances surrounding it as to whether it was murder, manslaughter, or justifiable homicide.

In the case of Buckner v. Commonwealth, 14 Bush, 601, this court held that it was proper, under an indictment for murder in that case, to give an instruction on involuntary manslaughter. The facts connected with that homicide, as recited in that case, undoubtedly supported the finding of the court. Thus it will be seen that in a number of cases this court has held that in instances where there was no eyewitness to the killing, and the evidence is purely circumstantial, it is the duty of the trial court to give to the jury, as said in the Rutherford opinion, all of the law that might be applicable to the case as developed by the facts proven. Where the physical facts do not preclude the existence of any particular theory as to the killing, the trial court should not deny to the accused the benefit of an instruction upon that point. Instructions should be based upon the testimony, and as said in the Ratchford case, the instructions should conform to the proof and be suggested by the proof, and it is only in that class of cases where there is a total absence of testimony as to the circumstances under which the killing occurred, that this court has held that the accused is entitled to an instruction covering every degree of crime, including self-defense.

Digitized by Google

In the case of Mackey v. Commonwealth, 80 Ky. 345, 4 Ky. Law Rep. 179, the accused was charged with killing a man who was sitting under a light talking to his friends. Mackey was in the dark and he was not identified. The trial court in that case refused to give an instruction on self-defense or voluntary or involuntary manslaughter, and, in commenting upon the action of the trial court, this court said: "There was no evidence in the case tending to show either heat of passion, self-defense, or involuntary manslaughter, and it was not proper for the court to instruct the jury on those branches of law, as there is not a single fact or inference to be drawn from any or all of the facts combined in the case that would render such instruction applicable." And this opinion was rendered by the court with a full knowledge that it had been repeatedly held that it is the duty of the trial court to fully instruct the jury on all law of the case, for the court further said: "It is true this court has held that it is the trial court's duty, whether asked to do so or not, to fully instruct the jury in all the law of the case. Yet it has never been decided that a routine of instructions, regardless of their applicability to the facts of the case, should be given."

And, again, in the case of Madison v. Commonwealth, 17 S. W. 164, 13 Ky. Law Rep. 313, in response to a complaint that the trial court had refused an instruction on involuntary manslaughter, this court said: "In Rutherford v. Commonwealth, 13 Bush, 608, it was held that: 'When no witness introduced on the trial saw the homicide committed, or saw the parties after they met on the occasion when the killing occurred, the law applicable to murder, manslaughter, and self-defense should be given, in order to meet any state of facts the jury may find from the circumstances in evidence to have existed.' And that

Digitized by Google

has since been adhered to. It is true, cases may occur where the issue is so plainly and palpably murder or no offense at all, as to render superfluous an instruction as to manslaughter." And, in this case, the court said that there was evidence tending to show that previous to the killing the accused and his daughter were quarreling in a loud and angry manner, and that he was therefore entitled to an instruction on the subject of manslaughter, but: "It was not proper to give an instruction on the subject of involuntary manslaughter. * * * For the evidence does not actually nor inferentially show a condition authorizing such instruction."

In the case of O'Brien v. Commonwealth, 89 Ky. 363, 11 Ky. Law Rep. 534, 12 S. W. 471, the accused was tried for the murder of Bettie Shea. The evidence in that case showed that she was last seen alive on Sunday night. Early the next morning she was found dead, lying upon the floor of her room, partially disrobed. The condition of the body showed that she had been struck several times upon the head with some blunt instrument, which crushed her skull. Her room was in a remote part of the house. The family by whom she was employed heard no noise and knew nothing of the killing until the next morning. The evidence in the case was purely circumstantial. A motive for committing the crime was shown. He was a strong and robust man, and she a delicate woman. The trial court refused to give an instruction as to manslaughter, and this court, in commenting upon his action, said: "It is not the duty of the court, in every case of homicide, to instruct as to both murder and manslaughter. Instructions must be based upon the evidence, and given to suit the case in hand." In this case, as in the case at bar, the accused denied the killing, and the court said that: "The plea of 'not

Digitized by Google

guilty' authorized him to rely upon every ground of defense, and entitled him, if the evidence authorized it, to an instruction based upon the idea that if he did kill the deceased, yet, if done in sudden passion, he was only guilty of manslaughter, yet he is a man, and she was a weak, defenseless woman. Motives are shown upon his part for killing her. Preparation with an adequate weapon was made. The killing was secret in character, and neither the clothing nor the person of the accused showed the least mark of any struggle. No instruction as to manslaughter should, therefore, have been given."

In the case of Slagel v. Commonwealth, 81 Ky. 488, 5 Ky. Law Rep. 545, accused was charged with the murder of three men. These three men, on the evening of August 13th, went to a grocery with the accused, bought a quart of whisky, paid $1 for it, received $9 in change, got a $20 bill changed, all left the grocery together, and returned to a rockhouse, where they were camping, and were seen at the rockhouse that night. The accused was sober, and all of the others intoxicated. The next morning the accused had disappeared; two of the men were found at the bottom of the cliff, one dead, and the other dying. The third man was found at the top of the cliff dead. Each of them had been knocked in the head with an ax, which was found near the rockhouse. No witnesses saw the killing. Three pallets, lying upon the floor, side by side, with a pool of blood at the head of each, gave mute evidence of the places where the deceased had been killed. In this case the trial court refused to instruct the jury on the law of self-defense, or killing in sudden heat and passion, and this court said: "The rule is, where there is any evidence tending to support any view of the case embraced by the position of the prosecution or the plea of the accused.

Digitized by Google

that it is the court's duty to instruct the jury with refernce thereto.; but, where there is no evidence in the case, or the evidence is of such character as to leave no room for doubt that any shade of a given phase of the law is not applicable to the case, it ought not to be embodied in an instruction to the jury. A treatise, abstract, or analysis of the whole law of homicide should not be given in every case, but only so much of the law as applies to the facts of the case under investigation."

The case of Brown v. Commonwealth, 122 Ky. 626, 92 S. W. 542, 28 Ky. Law Rep. 1335, is not in conflict with this opinion. Thus it will be seen that this court has not laid down the rule that in every case where there are no eyewitnesses to the killing, and the evidence is purely circumstantial, it is the duty of the trial court to give to the jury all of the law of homicide that might be given upon any state of case; but a careful analysis of all the opinions discloses this fact: That this court has held with a dgree of uniformity that it is the duty of the trial court to give to the jury all the law of the case, as warranted by the facts and circumstances proven; and in those cases in which the physical facts show that the homicide could not have occurred in a particular way, then it is not the duty of the trial court to give to the jury the law on that phase of the case. Where the physical facts are such as to preclude the idea that there was a struggle or any resistance offered, whatever, by the deceased, at the time that his life was taken, the trial court would be fully justified and warranted in refusing to give an instruction on self-defense. And, again, where the physical facts, as in the case before us, are such as to preclude the idea or the possibility that the killing was the result of an accident, or that it was the result of a sudden affray, then the trial

Digitized by Google

court would be warranted in refusing to give an instruction on the subjects of voluntary or involuntary manslaughter. This point is aptly illustrated in the case where an infant of tender age is murdered by having its throat cut, while lying in its crib. Most assuredly no instruction in a case of this kind would be given upon the subjects of voluntary or involuntary manslaughter, or self-defense; and, yet, if the position taken herein by appellant is tenable, this would have to be done. The same would be true in case a helpless paralytic should be murdered. And not unlike the case of the infant or the paralytic is the case before us. James R. York, an old man borne down by the weight of years, while lying upon a couch in the hallway of his own home, was foully murdered by an assassin with a gun; the whole top of his head being blown off, and, as shown by the testimony of the coroner, his death was instantaneous. He was unaware of the assassin's presence. He never moved after he received the fatal shot. The killing was done with a gun stolen from a neighbor's house, and a time selected when it was known he would be alone. Noiselessly, stealthily, the assassin or assassins approached him, and, without even arousing him from the slumber, in which they evidently found him, he was ruthlessly slain. The court gave to the jury every instruction which the evidence and the physical facts developed in this case warranted. He gave to the jury the whole law of the case. This killing was not the result of a sudden affray, nor was it done in the defense of any one, nor was it accidental; but the evidence shows that it was a cold-blooded murder. The idea that it was a justifiable homicide, or a case of voluntary or involuntary manslaughter, is precluded by the facts developed on the trial. We are convinced that the trial court, in all of his rulings during the

Digitized by Google

progress of the trial, committed no error prejudicial to the rights of appellant. He submitted to the jury the question of appellant's guilt or innocence as shown by the evidence, and it was for them to say, under the proof before them, whether or not appellant was proven guilty.

A motive was shown for the commission of the crime. That appellant had arranged to take part in its commission there cannot be the slightest doubt. Under his plea of "not guilty" he denies that he did the killing, and attempts to show that he was at another place when the killing must have been done. An alibi is the strongest possible defense when thoroughly established, but it becomes, at once, the most dangerous and weakest of all defenses that could be set up, when it is not thoroughly established. It has been wisely made the province of the jury to say, from the evidence presented in each particular case, whether or not the alibi has been established. In this case they had the witnesses before them. They had the facts and circumstances surrounding this killing presented to them. They heard the testimony offered by appellant to the effect that he was not in the locality at the time that the killing occurred; and, with all of the testimony before them, they returned a verdict finding him guilty of having committed a most deliberately planned and foully executed murder. Their finding and verdict, in the absence of any errors in the admission of evidence, or in the instructions to the jury, will not be disturbed.

The judgment is affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 96.—ACTION BY MARTIN CONNIFF AGAINST THE LOUISVILLE, HENDERSON & ST. LOUIS RY. CO. FOR DAMAGES FOR PERSONAL INJURIES.—February 27.

Conniff v. Louisville, H. & St. L. Ry. Co.

Appeal from Jefferson Circuit Court; Common Pleas Branch (Third Division).

MATT O'DOHERTY, Judge

Judgment for defendant. Plaintiff appeals. Affirmed.

1 Railroads—Killing Flagman at Street Crossing—Lookout Duty —Care Required.—In an action against a railroad company to recover damages for the killing by one of its trains of a flagman, stationed at a street crossing in a city, to warn persons attempting to cross the street, of the approach of trains, the court properly instructed the jury that it was the duty of the employees in charge of the train if they saw deceased in a place of peril from the approaching train, and apparently unconscious of his danger, to exercise ordinary care by the use of all means under their control to avoid injuring him, and that if they failed to do so, and by reason of such failure deceased was killed the law is for the plaintiff.

2. Approaching Trains—Duty of Flagman.—It is the duty of a flagman, who is stationed by a railroad company at a street crossing in a city, to warn persons of the approach of trains, to observe the approach of all trains and the company owes him no lookout duty whatever or to give him warning of the approach of its trains.

3. Same—Additional Labor—Care of Switch Lights.—In an action by the administrator of a deceased flagman of a railroad company for damages for being killed by a train at a street crossing, where he was employed to warn persons of approaching trains, the fact that it was a part of his employment to attend to the switch lights near the crossing, did not lessen

Digitized by Google

his duty to keep a lookout for all approaching trains, and the employees of the company on the train owed him no duty, unless they saw him in a place of peril, apparently unconscious of his danger, and if so it was then their duty to exercise ordinary care to avoid injuring him.

EDWARDS & OGDEN, attorneys for appellant.

HELM & HELM, attorneys for appellee.

OPINION OF THE COURT BY JOHN D. CARROLL, COMMISSIONER—Affirming.

Martin Conniff was injured in November, 1904, by one of the trains of appellee at the intersection of Fourteenth and Delaware streets, in Louisville, Ky., and from the injuries thus received died several months afterwards. Previous to his death he instituted this action to recover damages for injuries received. After his death it was revived in the name of his administratrix, and upon a trial the jury returned a verdict in favor of appellee. The sole ground upon which a reversal is sought is the alleged error of the court in instructing the jury.

Conniff had been in the employ of the company as a flagman for some 15 years, and had been stationed at Fourteenth and Delaware streets about three years. His duties were to warn persons attempting to cross Fourteenth street of the approach of trains to the Delaware street crossing, and also to light each night and take away each morning switch lamps on a switch a few feet south of the crossing. The passenger train by which he was struck was backing north on Fourteenth street; the engine being attached to the south end of the train. Standing on the front platform of the passenger car was a switchman in the employ of the company, whose duty it was in approaching a crossing to sound an air whistle that

Digitized by Google

could be heard several hundred feet away, and in cases demanding it to apply an emergency brake and bring the train to a sudden stop. The evidence shows that the train when it struck Conniff was going three or four miles an hour, and that Horn, the switchman, was at his place of duty on the platform, and sounded the whistle in the usual manner as he approached Delaware street. He testified that he saw Conniff when the train was about 150 feet distant take the lamp off of the stand, step to the side of the track, in a place of safety, and walk north towards the crossing a few feet away, and that just before he was struck by the steps of the passenger coach he left his place of safety by the side of the track, and walked close enough to the track to be struck. The court instructed the jury in substance that if the employes, or any of them, of appellee, in charge of the train, saw Conniff in a place of peril from the moving train, and apparently unconscious of his danger, it was their duty to exercise ordinary care by the use of all means under their control to avoid injuring him, and that if they failed to do so, and by reason of such failure Conniff sustained the injuries complained of, the law is for the plaintiff. Counsel for appellant asked the court to instruct the jury that it was the duty of those in charge of the train to exercise ordinary care to avoid injury to Conniff, and to keep a lookout and give the usual and customary signals of its approach to the crossing; and, if the persons in charge of the train failed to exercise ordinary care to avoid injuring Conniff, or to keep a lookout, or give reasonable warning of its approach to Delaware street, and by reason of this failure upon their part Conniff was injured, they should find for the plaintiff.

The chief points of difference between the instructions given and the ones offered are that in the

Digitized by Google

instructions offered appellee was held to the same degree of care that it owed to persons not in the employ of the company rightfully on or crossing the track, whilst in the ones given, the company was not guilty of negligence unless the employes in charge of its train saw Conniff in a place of peril apparently unconscious of the danger, and, if so, it was their duty to exercise ordinary care to avoid injury to him. In Coleman v. Pittsburg, C. & O. Ry. Co., 63 S. W., 39, 23 Ky. Law Rep., 401, Coleman, who was a crossing flagman, was struck and killed by a train at the crossing at which he was employed. The court held that the company did not owe Coleman any lookout duty, and was under no obligation to him to give warning of the approach of its trains, as it was his duty to observe the approach of all trains and to protect travelers at the crossing from injury. Counsel for appellant concede that under the authority of this case, if Conniff at the time he received the injury was in the actual discharge of his duties as a flagman watching the crossing, the instruction given by the trial court would be correct. They attempt, however, to distinguish this case from that upon the ground that Conniff under his employment performed two distinct duties, and occupied two separate offices—that of flagman and custodian of the target lamp—and that as he was injured when attending to his duties connected with the target lamps, and not his duties in connection with watching the street, appellee owed him a different and higher degree of care than it would be held to if his sole duty was that of a flagman. Under the facts of this case we cannot make the distinction drawn by counsel. The duties of Conniff in connection with the switch lamps and as flagman are so intimately connected that they cannot be separated into two classes.

Digitized by Google

The switch lamp was only a few feet from the crossing, and in attending to it he did not neglect his duties as flagman, nor was he prevented from discharging them. In fact, in caring for the switch lamps, he was practically at the crossing, and we are unable to find any substantial difference between this and the Coleman case. It was as much the duty of Conniff to keep a lookout for trains approaching the crossing and give warning to travelers when he was arranging the switch targets as it was when he had finished this task, and was engaged in no other way than as flagman. Resting the case upon this ground, appellee did not owe Conniff any lookout duty, and was under no obligation to give him warning of the approach of its trains; in fact, owed him no duty, until, as the court said in the instruction, he was discovered to be in peril.

A different rule obtains as to employes working upon the tracks or bridges of a railroad, or engaged in other employment, that do not impose upon them the duty of looking out for the approach of trains. Thus in L. & N. R. R. Co. v. Lowe, 118 Ky., 260, 25 Ky. Law Rep., 2317, 80 S. W., 768, 65 L. R. A., 122, an assistant inspector of trains, who was struck while upon the tracks in the discharge of his duties by an engine that approached him in the rear without giving warning of its approach, was held entitled to recover damages; the court ruling that an instruction that if the jury believed from the evidence that he was on the track in the usual course of his employment, and that the agents in charge of the engine negligently failed to ring the bell, or give other signal of its approach, etc., was proper, quoting with approval Thompson on Negligence, and many other authorities. And so in Cason v. Cov. R. R. Co., 93 S. W., 19, 29 Ky. Law Rep., 352, it was held to be the duty of persons

Digitized by Google

in charge of trains to give warning of their approach to persons engaged in repairing the track.

But the rule announced in these cases cannot for the reasons stated be applied to the case before us, and the judgment of the lower court must be affirmed.

CASE 97.—ACTION BY LULA WARFORD AGAINST S. M. DORRIS FOR DAMAGES FOR ALLEGED UNSKILLFUL AND NEGLIGENT TREATMENT OF A BROKEN ARM.—February 27.

Dorris v. Warford

Appeal from Ballard Circuit Court.

R. J. BUGG, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Physicians—Negligence—Damages.—The measure of damages for injuries sustained by a patient as the result of unskillful or negligent treatment by a physician is a reasonable compensation for the bodily pain and mental suffering endured, and the permanent impairment of ability to earn money, which are the natural and proximate result of such treatment.
2. Same—Degree of Care Required.—The care and skill required by a physician in treating a patient is not "his best skill and ability," but he must use that care and skill which is exercised generally by physicians of ordinary care and skill in similar communities.

J. M. NICHOLS & SON and M. T. SHELBOURN, attorneys for appellant.

HAL S. CORBETT and R. T. LIGHTFOOT for appellees.

Digitized by Google

(No briefs—record out of office.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On August 7, 1904, Miss Lula Warford had her arm broken by the turning over of a buggy in which she was riding at night. She was taken to the office of Dr. S. M. Dorris at Bandana. He examined the arm and found both bones broken between the elbow and the wrist, and that the break of the bones was oblique or slanting, and not square across. He put on a temporary dressing that night, and told her he would come to her house the next day and put on a permanent dressing. The next day he went to her father's house with another physician. They took off the temporary dressing and put on a permanent dressing. The arm was very much swelled the night before when the doctor dressed it, and was more swelled the next day. They thought they got it straight, and that it would heal up all right. The doctor visited Miss Warford several times after this, and she went sometimes to his office. Finally, she went to his office on one occasion, and, not finding him there, left a note on his slate saying that she would get another physician. For some weeks after this he did not see her. Finally he was sent for, and found the bandage on the arm loose. From that time he treated her, but her arm is curved and is not strong. There was some testimony on her behalf to the effect that the doctor took the dressing off when he ought not to have done so, and that this was the cause of the crooked arm. On his behalf the testimony tends to show that he removed the dressing at her request, and upon statements made by her to him which would justify a physician in removing the dress-

Digitized by Google

ing. She introduced some proof to show that the doctor did not pay as much attention to the arm as he should, and he introduced proof that she went about too much with the arm, and was not careful enough with it. The proof on both sides seems to show that such a fracture, where both bones are broken obliquely, is very hard to manage, and that in a large per cent. of cases where the best treatment is had a bad arm results. On these facts, the court instructed the jury as follows:

"(1) The court instructs the jury that if they believe from the evidence that the plaintiff, Lula Warford, engaged the professional services of Dr. S. M. Dorris to treat her injured arm, and that said defendant failed to exercise ordinary care and skill in such treatment as the exigencies of the case required, or such ordinary proper treatment as the defendant might have discovered to have been necessary by the use of ordinary care and skill in the examination of the injured arm, and you further believe from the evidence that by reason of such lack of ordinary care and skill upon the part of defendant, if any, plaintiff has been damaged, then you will find for her such actual damages as you may believe from the evidence she has sustained thereby, not exceeding the sum of ten thousand ($10,000) dollars, the amount claimed in the petition; and in estimating such damages, if any, you will consider the bodily pain and mental anguish suffered by plaintiff on account of the negligence of defendant in treating said arm, if any, and any permanent injury you may believe from the evidence has resulted to plaintiff from such negligent treatment, if any.

"(2) The court instructs the jury that negligence is the want of ordinary care; that ordinary care as applied to this case is that degree of care that physi-

Digitized by Google

cians and surgeons would ordinarily use in the practice of their profession of medicine and surgery—that is to say, their best skill and ability. The skill required by law in a physician and surgeon is that degree of skill possessed and exercised generally by physicians and surgeons of ordinary care and skill in the same or similar communities as was defendant located.

"(3) The court instructs the jury that unless you believe from the evidence that the defendant, Dr. S. M. Dorris, undertook to treat the plaintiff's arm, and failed to use the ordinary care and skill, as laid down in instruction No. 2, the law is for the defendant, and you should so find, although you may believe from the evidence that she sustained permanent injury to her arm, and that she suffered bodily and mental pain by reason thereof.

"(4) The court instructs the jury that if you believe from the evidence that plaintiff was guilty of negligence in failing to take proper care of herself, or to hold herself in readiness at reasonable times to be treated, and that such failure to take proper care of herself or to hold herself in readiness to be treated was the proximate cause of her permanent injury, and but for which negligence such injury would not have resulted, then the law is for the defendant, and you should so find, although you may further believe that defendant, Dr. S. M. Dorris, was guilty of negligence in the treatment of palintiff's arm."

The jury returned a verdict in favor of the plaintiff for $1,000. The court entered judgment on the verdict, and the defendant appeals.

Instruction No. 1 is erroneous in that it does not correctly define the measure of damages. It would be hard to measure in money the injury to a young woman from having a crooked arm, and sentiment

Digitized by Google

would enter into the matter, rather than the criterion of damages fixed by law. In the recent case of Lexington Railway Company v. Herring, 97 S. W., 1127, 30 Ky. Law Rep., 269, we said: "The cardinal trouble with the instruction of the court is that in stating to the jury the measure of damages, it authorized them to find for the plaintiff, among other things, 'such further sum as will fairly compensate her for the loss of her foot.' Different people might have very different ideas as to the amount of money that would compensate a woman for the loss of a foot. Such an instruction would be in effect to give the jury no criterion of damages, and is equivalent to an instruction to them to find for the plaintiff such sum as they deemed right, considering the injury she had received." In lieu of the latter part of instruction 1, the court should have told the jury that, if they found for the plaintiff, the measure of damages was a reasonable compensation to her for the bodily pain and mental suffering endured by her, if any, and the permanent impairment of her ability to earn money, if any, which were due to the negligence of the defendant in treating her arm, and were the natural and proximate result of such negligence on his part. Burk v. Foster, 114 Ky. 20, 69 S. W. 1096, 59 L. R. A., 277.

The second instruction is erroneous in requiring of the defendant his best skill and ability. The rule is that a physician must use that care and skill which is exercised generally by physicians of ordinary care and skill in similar communities, and the court should have so instructed the jury. Burk v. Foster, 114 Ky. 20, 24 Ky. Law Rep. 791, 69 S. W. 1096, 59 L. R. A. 277. No man is always at his best. One who employs a professional man may expect from him the ordinary care and skill of his profession. He is liable if he does not give this,

Digitized by Google

but more cannot be demanded. If the physician is responsible in any case where he does not exercise his best skill and ability, then it will be a material inquiry, and evidence may be offered to show what is his best skill and ability. This would be to introduce into the case a new and confusing issue which has never been allowed. When a person employs a physician, the law implies an agreement on his part to exercise the ordinary care and skill of the profession. The implied contract goes no further, and there is no liability on his part if the implied contract has not been broken. Were it otherwise, there would be no fixed rule in cases of this sort, and in every case the result would depend, not on the contract implied by law between the parties, but on the proof in that case as to the skill and ability of the physician. It is no defense to the physician that he used his best skill and ability if he fell short of the legal standard, and there is no liability on his part if his care and skill come up to the legal standard; for the plaintiff's cause of action rests in the end on the breach of the implied contract between the parties. In 5 Thompson on Negligence, sec. 6713, the rule is thus stated: "A physician possessing the requisite learning and skill is bound only to the exercise of reasonable care and diligence in their application to a particular case, and not the highest possible degree of care. Hence the physician or surgeon may have satisfied the legal requirements, though the care he bestowed was less in degree than that of another practitioner of even greater attainments, or even less than he himself might have bestowed on the case, where his learning and skill were greater than that of the great body of the profession. The exercise of this degree of care is the measure of professional duty in all cases without regard to the character or gravity of the injury

Digitized by Google

or disease." To the same effect, see Whitesell v. Hill (Iowa) 70 N. W., 750, 37 L. R. A., 830, and notes.

On another trial the court will omit from instruction 1 these words, "as the exigencies of the case required or such ordinary proper treatment as the defendant might have discovered to have been necessary by the use of ordinary care and skill in the examination of the injured arm," and in lieu of instruction 2 he will tell the jury that ordinary care and skill on the part of the defendant is that degree of care and skill usually exercised and possessed by physicians and surgeons of ordinary care and skill in similar communities. In addition to this, he will modify instruction 3 so as to read that, unless the defendant failed to use ordinary care and skill as defined in No. 2, the jury should find for the defendant, and that the defendant is not responsible for any bodily or mental suffering endured by the plaintiff, or any impairment of her power to earn money, which was due to her injury and would have resulted to her in any event, though treated with ordinary care and skill. By a fifth instruction he will tell the jury that negligence is the want of ordinary care, and that ordinary care on the part of the plaintiff is such care as persons of ordinary prudence usually exercise under similar circumstances.

Judgment reversed, and cause remanded for a new trial.

Digitized by Google

CASE 98.—CONSOLIDATED ACTIONS BY W. F. OWSLEY AGAINST S. H. BOLES AND WIFE, BY SAID BOLES AND WIFE AGAINST SAID OWSLEY, AND BY SID L. BOLES AGAINST THE HEIRS AND CREDITORS OF S. H. BOLES.—February 28.

Owsley, &c., v. Boles, Adm'r, &c.

Appeal from Barren Circuit Court.

C. T. ATKINSON, Special Judge.

From the judgments W. F. Owsley and J. H. Boles as administrator appeal. Affirmed.

1. Evidence—Bills and Notes—Pleading and Proof.—In an action to vacate a judgment on the ground that it was based on a usurious note, certain notes, set out in the petition and filed as exhibits in the action, the first of them being identified by the note sued on, and it, in turn, identifying the other notes, were competent evidence, although they were not proven; there being no denial of them in the answer.
2. Executors and Administrators—Claims Against Estate—Defenses—Usury.—Under the express provisions of the statute in regard to the settlement of estates, a creditor of the estate of a decedent must purge his claim from all usury by his oath or affidavit before the claim will be allowed. Hence the administrator of the estate need not pay a judgment based on a usurious note and subsequently sue to recover back the money.
3. Witnesses—Competency—Transactions with Deceased Persons. —Under the express provisions of Civil Code Prac., sec. 606, subsec. 2, claimants against the estate of a decedent are not competent to testify with regard to verbal statements of, and transactions with, decedent.
4. Limitation of Actions—Part Payment—Burden of Proof.—When a credit on a note is denied by the payor, the burden rests on the holder to prove it.

Digitized by Google

W. L. PORTER, A. J. CARROLL and J. W. JONES for appellant.

BAIRD & RICHARDSON, DUFF & HUTCHINSON and GEO. T. DUFF for appellees.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

In the year 1889 appellant W. F. Owsley instituted an action in the Barren circuit court against S. H. Boles and wife, upon a note for $6,248.53, with several credits indorsed thereon. The defendants made no defense, and judgment was rendered against them. A few years afterwards Boles and wife filed a petition asking that the judgment be vacated, for the reasons that Mrs. Boles was a married woman and she did not owe the debt or any part of it, and the judgment was void. He alleged that the balance of the note sued on was composed entirely of usury, and that he had overpaid the debt due Owsley. A demurrer was sustained to this petition, and Boles and wife were given leave to amend. They filed an amendment and a demurrer was again filed. About this time Boles became paralyzed and the case was continued from time to time until Boles died in 1902. His son, Sid L. Boles, administered on his estate. He brought this action to settle his estate, making the heirs, Owsley, and other creditors defendants. By an order of the court this case and the cases of W. F. Owsley v. Boles and Wife and Boles and Wife v. Owsley were consolidated. Owsley sought to have his judgment declared valid. The administrator and heirs endeavored to and did defeat it, and Owsley has appealed.

There was no oral evidence introduced with reference to this claim; the appellees contending in the court below and here that the whole claim was composed of usury, and that no part of it was just. Owsley denied this, and his counsel contend that under the

Digitized by Google

pleadings the burden of proof rested upon the appellees to prove that the claim was composed of usury, and, failing in this, the court should have allowed the claim. The note sued on by Owsley recites that it was given in renewal of a note of $4,743.19, with some other small claims and the interest added. With the petition of Boles and wife to have the judgment against them vacated was filed the note of $4,743.19, which recites that it was given in settlement of three notes executed by Boles to Owsley, two of them bearing 10 per cent. and the other 12 per cent. interest. All payments made by Boles were indorsed on each of the notes. It only requires a calculation, computing the interest at the legal rate, and giving to Boles the credits indorsed, to show that Boles had overpaid Owsley, and there was nothing due him; but Owsley's counsel contends that the notes were not proven and cannot be used as evidence in the case. These notes were copied in the petition and filed as exhibits in the action. There was no denial of them, and the note sued on identified the one next preceding it, and it identified the three previous notes. In our opinion they were competent evidence.

Owsley's counsel contends that he had the judgment for this debt, and the appellees cannot now defend on the ground of usury, and should be compelled to pay it, and, if it contains usury, they could then sue to recover it. In the case of Hemphill's Adm'r v. Millmore, 1 Ky. Law Rep., 331, this court passed upon this question contrary to appellant's views, using the following language: "If there was usurious interest allowed in the judgment rendered, the cross-appellant, by an express provision of the statute in regard to the settlement of estates, was under obligation to purge it of the usury. While a judgment at law may embrace usury, the debtor cannot ordinarily resort to

Digitized by Google

a court of equity and reclaim it or have the judgment modified to that extent, because he could have made a defense before judgment, although, when a debtor pays or satisfies the judgment, he may recover back the money by an action at law. In the class of cases to which this cause belongs it is not necessary that the administrator should pay the money, and then sue to recover it back because the statute interposes in his favor, and requires the creditor to plead it or purge it from all usury by his oath or affidavit before his claim will be allowed. In such case a judgment is not conclusive, and, so far as the judgment herein embraced usurious interest, the cross-appellant was not entitled to recover."

In this action by appellees to settle the estate of S. H. Boles, one J. H. Boles, as administrator of J. M. Boles, filed his answer and counterclaim, and sued on a writing in words and figures as follows: "This day received of J. M. Boles thirty-nine hundred and fifty dollars which he borrowed for me of W. F. Owsley and W. G. Hunter at 10 per cent. interest at 12 months and which I am to pay. June 8, 1876. S. H. Boles." Appellees filed a reply, pleading payment and the statute of limitations. The proof was taken, and on the trial the court found that the writing sued on had been satisfied by S. H. Boles in his lifetime; and the administrator of J. M. Boles appeals.

The appellant J. M. Boles and his sister, Mrs. Botts, gave their depositions in the case and testified with regard to verbal statements of and transactions with the deceased, S. H. Boles. They were distributees of J. M. Boles' estate and interested in the claims sued on. Under subsection 2 of section 606 of the Civil Code of Practice they were not competent to testify with reference to such transactions,

Digitized by Google

and the court did not err in refusing to allow this testimony to be heard. From the evidence in the case it appears that S. H. Boles and his brother, James M. Boles, had numerous transactions. They often loaned to each other money. The appellees filed with their reply many notes and checks showing that S. H. Boles had loaned to his brother about $3,000, all occurring since the date of the writing sued on by appellant. S. H. Boles in his will referred to these claims against his brother and directed that they be not collected. A few days before his death he conveyed to his brother 142 acres of land for the recited consideration of $1. Without going into the details, it is sufficient to say that there are many facts and circumstances showing that all matters between these brothers had been settled. The note sued on has a credit indorsed of $50 purporting to have been paid April, 1898. Appellees controverted this credit, and there was no competent proof adduced showing the payment. It is true that S. H. Boles gave his brother the check for $50 about that time, but there was no competent proof showing that the check or the amount thereof was intended to be credited on this claim. The rule is that, when a credit on a note is denied by the payor, the burden rests upon the holder to prove it.

For these reasons, the judgments on both appeals are affirmed.

Digitized by Google

CASE 99.—ACTION BY J. SOL SMITH AND OTHERS AGAINST MOLLIE STEVENS AND OTHERS TO RECOVER LAND.—February 28.

Stevens v. Smith, &c.

Appeal from Fayette Circuit Court.

WATTS PARKER, Circuit Judge.

Judgment for plaintiffs. Defendant Stevens appeals. Reversed.

1. Deeds—Conveyance for Specific Purpose—Failure to Carry out the Trust—Liability of Purchaser—Under Ky. Statutes, sec. 4846, providing that "where lands are conveyed or devised to trustees or executors in trust to be sold generally, or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase money, unless so expressly required by the conveyance or devise" Where a deed made to S. recited that "it is made with the understanding and agreement that S. has the right to sell the land, provided the money is reinvested in other lands, to be conveyed to S. during his life and after his death to his children,' a purchaser of the land from S. was not bound to look to the application of the purchase money paid to S., and is not liable to the children of S., after his death, by reason of his failure to reinvest the money as directed in the deed.

C. J. BRONSTON, attorney for appellant.

POINTS DISCUSSED AND AUTHORITIES CITED.

1. Did the deed of W. B. Smith and others to Geo. W. Smith in 1882, create a trust in favor of the children of Geo. W. Smith, which could not be revoked by the parties to that deed?

(a) The authorities in support of this proposition are clear, forceful and uniform. (Mellen v. Whipple, 1 Gray (Mass.) 317; Davis v. Calloway, 30 Ind., 112; Kelly v. Roberts, 40 N. Y., 432; Berkshire v. Insurance Co., Hutchings, 100 Ind., 490; Crowell v.

Digitized by Google

Curier, 27 N. J. Eq., 152; Colvin v. Newell, 8 Ky. Law Rep., 959; Jones v. Higgins, 80 Ky., 409; Pitman v. Pitman, 11 L. R. A., 456; McCartney v. Ridgeway, 32 L. R. A., 555; Enos v. Sanger, 37 L. R. A., 862; Hare v. Murphy, 29 L. R. A., 851; Jefferson v. Asch, 25 L. R. A., 257.)

2. Under the power given to Geo. W. Smith, to sell the land, the purchaser was not required to look to the reinvestment of the purchase price. (Section 4846 of the Kentucky Statutes; Sims v. Lively, 14 B. M., 433; Grotenkemper v. Bryson, 79 Ky., 353; Curd v. Field, 103 Ky., 293; Johnson v. Dumeyer, 23 L. R. A., 2243; Walter v. Brugger, 25 L. R. A., 1597; 2nd Perry on Trusts, 801; Wormly v. Wormly, 5 Law Edition, U. S. Supreme Court, 651; Muldrow v. Fox, 2nd Dana, 74; Larue v. Larue, 3 J. M., 159.)

3. The court should have allowed interest upon the $3,000 lien debt, mentioned in the deed, to W. B. Smith, and the time from which interest should have been allowed, was the 2nd day of February, 1889, the time when Geo. W. Smith undertook to pay to W. B. Smith the $3,000 by the execution of a deed of conveyance and the retaining of a lien for $6,000.

4. The court was certainly in error in adjudging to appellees more than a lien upon the land for the residue of the purchase money after paying the $3,000.

M. DON FORMAN, attorney fo. appellees.

JOHN T. SHELBY and FORMAN & FORMAN of counsel.

POINTS AND AUTHORITIES.

1. The deed of November 13, 1882, was an executed gift of George W. Smith to his children; and being completely executed was irrevocable. (Underhill on Trusts, pp. 42, 43 and 49; Reilly v. Whipple, 2 S. C., 277; Dickerson's Appeal, (Pa.) 8 Atl. Rep., 64; Strenlow v. Vonderhide, 3 Ky. Law Rep., 472; Berry v. Kinnard, 14 Ky. Law Rep., 578; McCartney v. Ridgney, 32 L. R. A., 563; Note, 32 L. R. A., 457; Bank v. Marksberry, 3 Litt., 276; Brown v. Brown's Adm'r, 4 B. Mon., 538; Gatewood v. Long, 14 Ky. Law Rep., 774; St. Joseph's Orphan Society v. Wolpert, 80 Ky., 86; Gault v. Trumbo, 17 B. Mon., 682.)

(a) An executed gift can be set aside by the donor only upon the ground of fraud or mistake; or by a judgment creditor of the donor upon a return of "nulla bona" in an action instituted within ten years from date of the gift. There is no allegation or evidence of fraud or mistake in this case, nor is any creditor of the donor assailing the gift. (Naper v. George, 79 Ky., 241; Martz v. Pfeifer,

Digitized by Google

80 Ky., 600; Phillips v. Ship, 81 Ky., 436; Dorcey v. Phillips, 84 Ky., 420; Brown v. Connell, 85 Ky., 403.)

(b) The wife of a father who makes a gift to his children can set it aside only to extent it affects her marital interest in property given. In this case the wife died before the father without ever attempting to set aside the gift to any extent whatsoever. (Manikee's Adm'r v. Beard, 85 Ky., 20; Gibson v. Gibson. 12 Ky. Law Rep., 636; Fennissey v. Fennissey, 84 Ky., 579.)

2. The record discloses no act, conduct, representation, or silence on the part of any of the appellees that may be construed as an estoppel; on the contrary every act done by appellees, as shown by the record, was rather a warning to any purchaser of the trust propery that they had not abandoned their rights under the deed creating the trust.

3. The purchaser from a trustee with notice, actual or constructive, of the trust, purchases subject to the trust; and if the conveyance is in contravention of the terms of the trust the purchaser becomes a constructive trustee, and bound to perform the trust. (Robinson v. Pierce, (Ala.) 72 Am. St. Rep., p. 160 and cases cited in the opinion; Pomeroy's Equity, vol. 2, sec. 626 and 1048; Rogers v. Reid, 14 Ky. Law Rep., 811; Oliver v. Piatt, 3 Howard, 333.)

(a) The purchaser from a trustee of a trust of a defined or limited nature must see that the proceeds of sale are applied to the proper discharge of the trust, even if the instrument creating the trust does not so expressly require, notwithstanding the provisions of sec. 4846, Ky. Statutes. (Groten Kemper v. Bryson, 79 Ky., 353; Curd v. Field, 103 Ky., 293.)

4. The trustee's power of sale in this case was not absolute or unlimited, but on the contrary was limited and conditioned upon a reinvestment of the proceeds of sale for the benefit of the cestuis que trust. The sale and reinvestment were intended to be concomitant and interdependent, the reinvestment being in the nature of a condition precedent or concurrent to the right to sell; and such condition not having been performed the trustee's power of sale was never called into existence, and in consequence no title to the trust property passed under his attempted conveyance thereof, but only the title to his life estate therein, held in his own right. (Sharpley v. Plant, 89 Am. St. Rep., 592; Bent Otero, &c. Co. v. Whitehead, 71 Am. St. Rep., 143; Whippen v. Whittier, 117 Ill., 282; Perry on Trusts, sec. 602; Williams v. Peyton, 4 Wheat, 77; Taylor v. Herring, (note) 19 Am. St. Rep., 280; Powers v. Kuechkoff, 41 Mo., 425, 79 Am. Dec., 281; Sears v. Livermore, 17 Iowa, 297, 85 Am. Dec., 564; Randolph v. East Birmingham Land Co., (Ala.) 52 Am. St. Rep., 64.)

5. An obligation for payment of money which expressly pro-

Digitized by Google

vides that it shall not bear interest does not bear interest from and after its maturity.

6. Cross-appeal—If reversed upon the original appeal upon the theory that appellees are entitled to an equitable lien on the land and not to the title, or upon the theory that the trust property cannot be followed, in either event it should be adjudged that W. B. Smith is personally liable to appellees under his agreement of February 2, 1889, for the trust fund arising from the sale.

7. Exceptions to a judicial sale made in a partition suit filed by a tenant in common residing upon the land sold and a party to the action, upon the ground that the commissioner's advertisement of sale did not describe by metes and bounds but by reference only, a small tract to be excepted from the land ordered sold, which was described by metes and bounds, are not available to vacate the sale, especially when the location of the excepted tract has been established for a period of over twenty years, and when no evidence is introduced to show that any one was mislead by the advertisement or that the price brought was inadequate. (Jones v. Brown, 7 Ky. Law Rep., 446.)

(a) An undenied allegation of indivisibility must be taken as true. (Stulz v. Fasting, 13 Ky. Law Rep., 172; Booker v. City of Louisville, 76 S. W., 18.)

(b) Illness of owner at the time of a judicial sale presents no ground for vacation thereof. (Booker v. City of Louisville, supra.)

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

On November 13, 1882, the brothers and sisters of George W. Smith conveyed to him a tract of land in Fayette county, in consideration of a settlement among the heirs of Solomon Smith and of $3,000 to be paid without interest by Geo. W. Smith to W. B. Smith, one of the grantors. The deed contains, among other things, these words: "This deed is made to said George W. Smith by the parties of the first part with the understanding and agreement thereof, the said George W. Smith has the right to sell the land provided the money is reinvested in other lands to be conveyed to said George W. Smith during his natural life and after his death to his children, and

Digitized by Google

the land hereby conveyed to said George W. Smith is not to be liable in any way or manner for any debt he may create except the three thousand ($3,000.00) dollars owing to W. B. Smith aforesaid and for the payment of which a lien is reserved." On December 2, 1889, Geo. W. Smith and wife conveyed the tract of land to W. B. Smith, and W. B. Smith and wife on March 3, 1891, conveyed it to W. F. and J. O. McAllister, in consideration of $10,122.50; the deed to W. B. Smith having been executed simply for the purpose of selling the land, and without any consideration. Out of the purchase money received from the McAllisters, W. B. Smith was paid his debt of $3,000, but the remainder of the purchase money was not reinvested in other lands conveyed to Geo. W. Smith during his natural life and after his death to his children. On March 1, 1893, McAllister sold and conveyed the land to J. Valentine Stevens, and on October 8, 1901, this action was brought by the children of Geo. W. Smith against Stevens to recover the land from him on the ground that he took no title, because Geo. W. Smith had under the deed only the power to sell the land, provided the money was reinvested in other lands, to be conveyed as therein set out. The circuit court adjudged them the relief sought, and Stevens appeals.

Under the rules of equity it seems that it would be held that under the deed the purchaser would be required to see to the application of the purchase money, and that as Geo. W. Smith had the right to sell the land, provided the money was reinvested in other lands, to be conveyed to him during his life and after his death to his children, he was without authority to make the deed, except upon the conditions named. But the common law rule has been changed in this State by section 4846, Ky. Stats., 1903:

Digitized by Google

Where lands are devised to be sold on special or general trust, or are conveyed or devised to trustees or executors in trust to be sold generally or for any specific purpose, the purchaser shall not be bound to look to the application of the purchase money, unless so expressly required by the conveyance or devise."

In Johnson v. Dumeyer, 66 S. W. 1025, 23 Ky. Law Rep., 2243, the land was devised to a daughter of the testator, and she was given power to sell the land, but the proceeds of the sale were to be invested in other real estate and held for certain purposes. It was held that under the statute above quoted the purchaser was not bound to look to the application of the purchase money; he not being required to do so by the will. In Miller v. Stagner, 76 S. W. 160, 25 Ky. Law Rep. 650, land was devised to a son for life, and he was authorized to sell it upon condition that the proceeds were invested in other good property to be held under certain limitations. The court, after referring to the case of Grotemkemper v. Bryson, 79 Ky. 353, 2 Ky. Law Rep. 335, said: "The devisee, Malcolm M. Miller, although given only a life estate by the will, is authorized by it to sell and convey the property. In selling and conveying he acts as trustee under the will, and holds the proceeds received for the property also as trustee. He is authorized to sell and convey upon the express condition that the proceeds shall be invested in other good property, to be held under the same limitation and condition. This condition is imposed upon the devisee who is charged with the trust of reinvesting the proceeds. The land is therefore devised to a trustee in trust, to be sold for a specific purpose according to the terms of the statute and the purchaser is not bound to look to the application of the purchase money, there being nothing in the devise

Digitized by Google

expressly requiring him to do so." In Robinson v. Pence, 76 S. W., 368, 25 Ky. Law Rep., 733, the property was devised to the son for life, with remainder to his children. He was authorized to sell the land and reinvest the proceeds in other real estate subject to the same trusts and conditions. The purchaser was held not required to see to the investment of the proceeds of the sale.

These opinions control the case before us. It was manifestly the purpose of the statute to change the common-law rule and to render titles more safe. It is in line with the modern tendency favoring the sale of land and the vesting of absolute titles. The language of the statute is that the purchaser shall not be bound to look to the application of the purchase money unless so expressly required by the conveyance or devise. This literally means that the purchaser is not bound to look to the application of the purchase money unless he is expressly required to do so by the conveyance or devise. Since the statute was enacted, in order to charge the purchaser with the application of the purchase money, it must be expressly provided in the deed or devise that he is to see to the investment of the purchase money, or there must be other language therein expressly imposing this duty upon him. See Magowan v. McCormick, 10 S. W., 632, 10 Ky. Law Rep., 753. In the case at bar there is nothing in the deed requiring the purchaser to look to the application of the purchase money. The duty of reinvesting the purchase money devolved upon Geo. W. Smith, and the purchaser was not affected under the statute by Smith's failure to reinvest the proceeds of the sale as directed by the deed.

Judgment reversed, and the cause remanded for a judgment as herein indicated.

Digitized by Google

CASE 100.—ACTION OF EVA FITZPATRICK BY J. K. P. SOUTH AGAINST S. M. NOEL TO CANCEL A COMMISSIONERS' DEED ISSUED TO THOMAS Y. FITZPATRICK. —February 28.

Noel v. Fitzpatrick

Appeal from Franklin Circuit Court.

ROBERT L. STOUT, Circuit Judge.

From the decree defendant appeals. Reversed.

1. Trusts—Resulting Trust—Payment of Consideration for Conveyance to Another.—Where one who purchased at a commissioner's sale and who paid the consideration caused the conveyance to be made to another, the grantee held the land in trust for the purchaser.
2. Husband and Wife—Disabilities of Coverture—Contracts.—Under the statute of 1894 (Acts 1894, p. 176, c. 76), providing that a married woman may take, acquire, and hold property, and that she may in her own name, as if unmarried, sell and dispose of her personal property, a married woman who purchased land at a commissioner's sale was under no disability precluding her from assigning her bid and purchase to her husband.
3. Witnesses—Competency—Transactions with Decedent.—In a suit by the heirs of a married woman to set aside an assignment made by her to her husband of her purchase and bid at a commissioner's sale, the husband was incompetent to testify concerning any verbal transactions between himself and his deceased wife.
4. Judicial Sales—Title and Rights of Purchasers—Assignment of Bid Sufficiency.—Civil Code Prac., sec. 398, provides that a conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance. A purchaser at a sale by a commissioner, after confirmation, filed in the court a writing requesting that conveyance be made to another. Held, that such transaction was sufficient to pass

Digitized by Google

the purchaser's interest, as the title to property sold at decretal sale does not pass to the purchaser until it is conveyed under proper order of the court; the purchaser's interest in the meantime being merely an equitable one.

B. G. WILLIAMS for appellant.

POINTS AND AUTHORITIES.

1. Mrs. Fitzpatrick was never the real purchaser, but the announcement by her husband of Mrs. Fitzpatrick as the bidder under the facts shown in the record constituted her in law the agent of her husband. (Lyle v. Lyle's Adm'r, 4 Ky. Law Rep., 990; Brown v. Bristo, 7 Ky. Law Rep., 599.)

2. An order for a deed and the execution of such deed are necessary to pass the title. (Civil Code, secs. 396, 397 and 398; Dickerson's Heirs v. Talbot's Ex'rs, 14 B. Monroe, 59; Gill v. Hewett, 7 Bush, 10; Miller v. Hall and wife, 1 Bush, 229.)

3. The bid of Mrs. Fitzpatrick's was assignable. (Miller v. Hall and wife, 1 Bush, 229; Buford v. Buford, 1 Bibb, 305; Vangordor v. Lundy, 56 Iowa, 448; 65 Missouri, 315.)

4. Precedent to the Act of 1894, notes belonging to the wife if reduced to the husband's possession, were his, and he had the right to reduce them to his possession. (Wiggins v. Johnson, &c., 12 Ky. Law Rep., 276; Waldon v. Phillips, 86 Ky., 307.)

5. Husband entitled to receive wife's distributable share of decedent's estate. (Thompson's Adm'r v. Elam's Ex., 11 Ky. Law Rep., 455; 5 Dana, 475.)

6. A gift from wife to husband will be sustained. (Long v. Beard, 20 Ky. Law Rep., 1036; Stone and wife v. Werts, &c., 3 Bush, 486.)

7. Wife estopped. (Eckermeyer v. Hoffmeier, 98 Ky., 724.)

JOHN W. RAY for appellee.

POINTS DISCUSSED.

1. The wife of T. Y. Fitzpatrick was the purchaser at judicial sale of 260 acres of land; the sale was confirmed to her; she gave an order for a deed to her husband; we contend the conveyance to him was void, or that he was a trustee for her. (Long v. White, 5 J. J. M., 227; Perry on Trusts, secs. 202, 203 and 204; Pomeroy Eq., vol. 2, secs. 1049, 1051 and 1053; Dickerson v. Godwise, 1 Sandfor, ch. 214 and cases cited.)

2. By the sale and confirmation to Mrs. Fitzpatrick the title to the land was in her, and she could not divest herself thereof by

Digitized by Google

the order. (Hughes v. Swope, 88 Ky., 254; Jones v. Biggstaff, 95 Ky., 395; Vance's Adm'r v. Foster & Ray, 9 Bush, 392.)

3. Appellant Noel was purchaser pendente lite, with full actual notice of all the facts and of this suit, and got all he paid for, that is, the life estate of T. Y. Fitzpatrick. He has no cause of complaint, except that Tom Fitzpatrick did not live longer, and cannot be remedied.

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

In 1897, M. E. Trimble, trustee for Narcissa Fitzpatrick, brought suit against J. H. Bowen and others to foreclose a mortgage for the purpose of collecting $2,387.35, with interest from December 15, 1883. There was at the same time a prior lien upon the property sought to be sold adjudged to John A. Lewis for $2,250, with interest from November 15, 1894, and other inferior liens adjudged to M. E. Trimble, trustee. In due course of time a judgment was rendered directing the property to be sold by the master commissioner. At the commissioner's sale Thomas Y. Fitzpatrick bought the property, and announced at the time that he did so that his wife, Narcissa Fitzpatrick, was the bidder. A sale bond was prepared, and Fitzpatrick signed his wife's name by himself as attorney, and signed his own name thereunder as security for her. The sale was in due time confirmed. After confirmation Mrs. Fitzpatrick, by a writing, recited the fact that her husband, Thomas Y. Ftizpatrick, had paid the purchase price, and requested the court to make an order for a deed to be made to him. This writing was filed in the court, and thereafter the court by an order directed the master commissioner to convey the land to Thomas Y. Fitzpatrick, which was done. Shortly thereafter Fitzpatrick and his wife executed a mortgage on this land to the Safety Vault & Trust Com-

Digitized by Google

pany, of Frankfort, for the purpose of raising money thereon. The indorsement on the bond shows that Fitzpatrick paid to the master commissioner the Lewis debt in two checks, one for $1,325, and the other for $1,305.52. There is no evidence showing that that portion of the debt which was going to M. E. Trimble as trustee for Narcissa Fitzpatrick was paid at all. Narcissa Fitzpatrick died some time in 1900, and in 1904 Eva Fitzpatrick, daughter of Narcissa and Thomas Y. Fitzpatrick, by her next friend, J. K. P. South, filed her suit in the Franklin circuit court to cancel the deed from the master commissioner to her father, on the ground that the allegation in the assignment which her mother made to her father was false, in so far as it recited that the purchase price for the land had been paid by Thomas Y. Fitzpatrick. The petition further alleged that the assignment was obtained by reason of the confidential relation which existed between her father and mother as husband and wife; that her mother had no power or authority in law to execute such writing, and that the same when executed was void; that there was no consideration for the assignment, and that it was procured by fraud, and that her father concealed his true intent and purpose in procuring it; and that the deed executed in pursuance of the order of court directing it to be made to her father under said assignment was void. The first paragraph of the answer is a traverse. In the second paragraph Thomas Y. Fitzpatrick alleged that he was the actual purchaser of the land; that he had it cried down to his wife, who was not present, as the purchaser merely for convenience, and in order that he might become surety in the bonds. He denied that his wife paid any part of the purchase price, or caused any part thereof to be paid, and averred that

Digitized by Google

he prepared the assignment from his wife to himself, and that after she had executed it he presented the assignment in court, in order that he might have the deed made to himself as the real purchaser. A demurrer was filed to the second paragraph of this answer and sustained. Pending the litigation Eva Fitzpatrick reached her majority, and, this fact being made known to the court by proper proceeding, an order was entered directing that the suit proceed and be prosecuted by her in her own proper person, which was done. After the institution of the suit S. M. Noel, appellant here, purchased of Thomas Y. Fitzpatrick the farm in controversy for $8,000, $3,000 of which was paid in cash to said Fitzpatrick, and an obligation entered into by and between Noel and Fitzpatrick reciting that the remaining $5.000 was to be paid upon the settlement of the litigation. S. M. Noel, who by his purchase had succeeded to the rights and interest of Fitzpatrick in the land, filed his suit to be made a party. This was done, and his answer was taken as a cross-petition against the plaintiff, Eva Fitzpatrick. Noel adopted all the allegations of the answer of Thomas Y. Fitzpatrick. Shortly after this Fitzpatrick died. Issue having been joined, proof was taken, and upon final hearing the trial court adjudged that "the assignment from Narcissa Fitzpatrick to T. Y. Fitzpatrick, her husband. dated January 28, 1898, of her purchase of the land in contest, and described in the petition herein, that had theretofore been sold by the court's commissioner in the consolidated action of Crutcher & Starks, etc., v. J. H. Bowen, and the report of sale being made to Narcissa Fitzpatrick, purchaser, had been confirmed, was and is void, and conveyed to the said T. Y. Fitzpatrick, husband, no interest, right, or title in the lands so sold; and further adjudges that the deed

Digitized by Google

executed by the commissioner under orders of the court in the case of Crutcher & Starks and others against J. H. Bowen and others to T. Y. Fitzpatrick, dated January 28, 1898, was and is void and of no force and effect because the same was obtained by virtue of the assignment from Narcissa Fitzpatrick to her husband, T. Y. Fitzpatrick." And the court thereupon set aside and canceled and held for naught the deed from the master commissioner to Thomas Y. Fitzpatrick, and directed the commissioner to make a deed to Narcissa Fitzpatrick, effective as of the date of the deed to Thomas Y. Fitzpatrick, for the land sold and confirmed to her, and adjudged to plaintiff her costs. Thereafter the master commissioner, W. H. Posey, executed in due form a deed conveying the land to Narcissa Fitzpatrick as directed. From the correctness of the court's ruling and judgment, the defendant, Noel, prosecutes this appeal.

Two questions are raised for determination upon this appeal: First, should the demurrer have been sustained to the second paragraph of defendant's answer? and, second, was the assignment of her bid and purchase by Narcissa Fitzpatrick to her husband void?

We will first consider the ruling of the court on the demurrer. The allegation of the second paragraph is that Thomas Y. Fitzpatrick was the real purchaser at the sale, although the sale was reported as having been made to Narcissa Fitzpatrick. For the purposes of the demurrer, this allegation is admitted to be true. If, in fact, the husband was the real purchaser, then, even though the deed had been executed to the wife, she would have been holding the land in trust for her husband; and, if she refused to convey the land to him, upon a proper showing,

Digitized by Google

following the rule of this court laid down in the case of Lisle v. Lisle's Adm'r, 4 Ky. Law Rep., 990, the court would have directed the property to be conveyed to him. In the case of Brown v. Bristow, 7 Ky. Law Rep., 599, this court said: "It appearing that the purchase of land by appellees at judicial sale was for appellant, and that she paid the sale bond, the deed should have been made to her." Equity will always interfere to see that the real purchaser—the one who has paid the price—gets the property, in the absence of any fraud, even though the bid at the sale be taken in the name of another. We are of opinion that the demurrer should have been overruled.

We come now to a consideration of the second question in the case, which is: What force shall be given to the assignment of the bid and purchase which Narcissa Fitzpatrick executed and delivered to her husband, and which was filed with the records in the case in court by him, and upon which the court acted in directing the commissioner to convey the land in question to the husband? Prior to the passage of the act of 1894 (Acts 1894, p. 176, c. 76) known as the "Weissinger Act," a married woman had practically no authority in law to deal with third persons, much less with her husband. Her acts were void. It is true that before the passage of this act, with the aid and assistance of a court of equity, upon a showing by her that her husband was confined in the penitentiary, or had abandoned her, or was an incurable lunatic, or utterly failed to provide a support for her, the wife could be empowered to act as a feme sole; or upon the joint application of the husband and wife, upon a proper showing, the wife might be empowered to transact business to a limited degree, as an unmarried woman. It will be observed, however, that in order to be empowered to act for herself at all it

Digitized by Google

was necessary that she should go into a court of equity and, by proper pleading, expose the existence of an unfortunate condition in her domestic affairs. This was unpleasant and frequently embarrassing, to such an extent that but few married women availed themselves of the benefits of this privilege; and it was not until the passage of the Weissinger act, in 1894, that married women were authorized to transact business for themselves in a manner at all satisfactory to them. The act referred to is in the following language: "A married woman may take, acquire and hold property, real and personal, by gift, devise or descent, or by purchase, and she may, in her own name, as if she were unmarried sell and dispose of her personal property. She may make contracts, and sue and be sued, as a single woman, except that she may not make an executory contract to sell or convey or mortgage her real estate, unless her husband join in such contract; but she shall have the power and right to rent out her real estate, and collect, receive and recover in her own name the rents thereof, and make contracts for the improvement thereof. A gift, transfer or assignment of personal property between husband and wife shall not be valid as to third persons, unless same be in writing, and acknowledged and recorded as chattel mortgages are required by law to be acknowledged and recorded; but the recording of such writing shall not make valid any such gift, transfer or assignment which is fraudulent or voidable as to creditors or purchasers." Giving to this statute its literal construction, it does not prohibit the wife from dealing with the husband, but only provides the manner in which she may deal with him as affecting her personal property so far as third persons are concerned. We take it that the Legislature intended that the wife should have all of the

Digitized by Google

rights of an unmarried woman in dealing with her property, saving and excepting those which it expressly denied to her. This being true, Narcissa Fitzpatrick had a perfect right to assign to her husband her bid and purchase of the land in question, in the manner in which she did, unless by the confirmation of the sale her title in the land had become perfected to such an extent that, in order to pass the title, it was necessary for her to sign and acknowledge a deed therefor. By the act of the auctioneer in declaring her the bidder at his sale and accepting her bond for the purchase price of the land sold, she acquired an equitable interest in the property, and this equitable interest or right in the property was perfected in her by the confirmation of the sale at a later date. But the title to property sold at decretal sale does not pass to the purchaser, nor is the purchaser vested therewith, until it is conveyed, under proper order of the court, by the commissioner of the court to the purchaser. Sections 396, 397, 398, of the Civil Code of Practice. Until it is so conveyed it remains but an equity—perfected, it is true, by the confirmation—in the purchaser; and, being but an equity, it is such an interest in, or right to, the property as can be transferred and assigned in the manner in which it was assigned in the case at bar.

Evidently, if the purchaser had been the husband, and the sale had been confirmed to him and thereafter he had transferred his bid and purchase to his wife in the same manner and form as his wife did to him, no question would be made as the regularity of the transaction or the validity of the assignment; and, as we have said, it was evidently the purpose of the legislators in passing the act of 1894 to give to the wife the right and privilege of dealing with her own property as though she were unmarried, subject to the

Digitized by Google

restrictions contained in the statute. This being true, the wife here had the right to assign her bid and purchase to her husband. The law does not require any greater degree of formality in the transfer of an equity by the wife to the husband than it would in the transfer of a like equity from the husband to the wife. The assignment recites that the purchase price was paid by Thomas Y. Fitzpatrick. At the date of the assignment all of the purchase money was not due, and the record shows that Fitzpatrick paid only that part of the purchase price which was due and going to John A. Lewis in satisfaction of his first lien on the land. No part of the money which was going to his wife, Narcissa Fitzpatrick, was paid by him, and, while she had a right to give her husband the money which was due her out of the sale of this land, had she desired to do so, still there is nothing in the record in this case to show that she intended to make a gift of this money to her husband, and, in the absence of such showing, we conclude that she did not intend to part with her right to receive the money due her out of the sale bonds. In order to support a gift of personalty from the wife to the husband, the proof must be clear and positive that the wife in making the gift fully understood the transaction, and was free from any undue influence or control of her husband growing out of their marital relation. On March 1, 1897, the date of the sale by the commissioner, the mortgage debt of Narcissa Fitzpatrick amounted to $4,281.31, and the debt of John A. Lewis, which was a superior lien, amounted to $2,559.37. The land brought at the sale $7,250, which was enough to satisfy both debts and costs. Narcissa Fitzpatrick died some time during the year 1900—the record does not disclose the exact date, and we presume she died intestate, as no mention is made

Digitized by Google

of any will left by her. Thomas Y. Fitzpatrick, upon the death of his wife, became the owner, by inheritance, of one-half of her entire personal estate; the remaining one-half passed, by the law of descent, to her only child, the appellee herein, in the absence of any testamentary disposition thereof by her. Included in the personal estate of his wife was this claim of $4,281.31, with interest from March 1, 1897, till the date of her death. The record shows no evidence of fraud or deceit practiced by the husband in procuring the assignment from his wife of her bid and purchase of the land in controversy. This being true, and she having the right to make the assignment, her husband, upon the execution of the deed by the master commissioner to him, became the owner of the land in question, and, having sold and transferred it to appellant, S. M. Noel, the trial court should have adjudged it to him, under the terms of his purchase thereof from Thomas Y. Fitzpatrick. Thomas Y. Fitzpatrick was not a competent witness to testify concerning any verbal transaction between himself and his deceased wife, and his testimony has not been considered by us upon this appeal. Upon a return of this case to the trial court S. M. Noel will pay to the master commissioner of the Franklin circuit court the remainder of the purchase money due upon said land according to the terms of his purchase, and, upon receipt thereof, the master commissioner of the Franklin circuit court will execute a proper release of the lien upon the record for the remainder of the purchase money. Out of the money so paid into court by Noel one-half of the claim of Narcissa Fitzpatrick, to-wit, one-half of $4,281.31, with interest from March 1, 1897, will be paid to appellee, and the remainder of funds in court, less the costs, will be paid to the personal representative of Thomas Y.

Digitized by Google

Fitzpatrick. The trial court will set aside the order canceling the deed from the master commissioner to Thomas Y. Fitzpatrick, and also the order directing the master commissioner to convey the property described in this suit to Narcissa Fitzpatrick, and all other orders made by him in signing and approving the deed from the master commissioner to Narcissa Fitzpatrick, and he will enter an order canceling and holding for naught the deed from the master commissioner to Narcissa Fitzpatrick, and he will adjudge S. M. Noel the owner of the land in question under his purchase from Thomas Y. Fitzpatrick.

This case is reversed for the reasons indicated, and remanded to the trial court for further proceedings consistent with this opinion.

CASE 101.—ACTION BY DAVID RHOADES AND OTHERS AGAINST JOHN PENN TO QUIET TITLE TO LAND. —February 28.

Penn v. Rhoades, &c.

Appeal from Taylor Circuit Court.

I. H. THURMAN, Circuit Judge.

Judgment for plaintiffs. Defendant appeals. Affirmed.

1. Administrators—Sale—Payment of Debts—Who May Purchase. —Where the commissioner, under an order to an administrator to sell real estate to pay debt, becomes the purchaser at his own sale, directly or indirectly, there is no sale.
2. Same—Who May Question Validity.—Though the heirs resided

Digitized by Google

in the vicinity of lands from the time of administrator's sale, and during subsequent transactions and sales thereof, they are not estopped from claiming the land on the ground of fraud in the administrator's sale, where they were in no position to know the title to the land and were not parties to any of the transactions.

3. Quieting Title—Administrator's Sale—Estoppel of Heirs—Condition Precedent.—Where the commissioner, under an order to sell real estate to pay debts of an estate, becomes the purchaser at his own sale, the heirs in an action to quiet title in them will be required to refund the commissioner's grantees his purchase money with interest, before being entitled to a decree.

4. Remainders—Actions Against Remainderman—Accrual of Right of Action—Possession of Real Property.—The statute of limitations does not commence to run against a remainderman until his right of entry accrues by the termination of the life estate.

HUGH P. COOPER, attorney for appellant.

(No brief in the record.)

S. A. RUSSELL and L. RUSSELL for appellees.

POINTS AND AUTHORITIES CITED.

Kentucky Statutes, section 11; Kentucky Statutes, section 1711; General Statutes, chap. 38, art. 15, section 2; Bagby v. Eversole, 6 Ky. Law Rep., 365; Price v. Thompson, 84 Ky., 219; Smith v. Pope, 5 B. M., 337; 69 Indiana, 260; 6 T. B. Monroe, 102; Groover v. King, 46 Ga., 101.

1. The above are on the question of a master commissioner purchasing at his own sale and hold that he cannot.

2. Estoppel—

(a) Definition of estoppel (16 Cyc., 726).

(b) No estoppel without full knowledge. (Ford v. Mayo, 91 Ky., 83, 12 Ky. Law Rep., 665; Honore v. Dougherty, 4 Bibb, 280; Shipp v. Swann, 2 Bibb, 82; Dean v. Skinner, 3 Ky. Law Rep., 336.

(c) Public record a matter each party should know. (16 Cyc., 140, and cases in note; Fisher v. Mossman, 11 Ohio St., 42; Cook v. Foster, 96 Mich., 610; Adkins v. Adkins, 48 Ind., 12; Campbell v. Jacobson, 145 Ill., 389.)

(d) No estoppel where party ignorant of facts (16 Cyc., 740.)

Digitized by Google

(e) Must have misled to prejudice. (Robertson v. Robertson, 72 S. W., 813, 24 Ky. Law Rep., 2020.)

(f) No estoppel by receiving proceeds. (Groover v. King, 46 Ga., 101.)

3. Statute of limitations does not apply. (Francis v. Wood, 81 Ky., 16; Jeffries v. Butler, 22 Ky. Law Rep., 226.)

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

Walker Rhoades died in Taylor county, Ky., about the year 1863; he left surviving him his widow, Eliza, and seven children. Soon after his death the children, by proper proceedings, had his lands partitioned among them, except the home farm of 134 acres, which was allotted to the widow as dower. One Cox became his administrator, and administered the personal property, on finding that it was insufficient to pay all of the debts of the decedent, and, in the year 1865, instituted an action for the purpose of selling enough of the real estate to pay the balance of the debts, and the court rendered a judgment in the action directing the sale of the remainder interest in the homestead, and directed J. R. Robinson, as commissioner, to make the sale, which he did, in 1867, at the price of $50, and made a report pretending that one J. N. Turner was the purchaser, who executed bond for the purchase money, with the commissioner, J. R. Robinson, as surety. That report was confirmed by the court, but no deed was ever made to Turner, or any one else. It appears that in 1873 J. R. Robinson sold the remainder interest to Rhoades' widow, then Gabehart, at the price of $110; she paid him $39 in cash, and gave her note for the balance, with a lien upon the land. Robinson transferred this note to one Hubbard, who afterwards instituted an action on it to enforce the lien; and another sale was made by one Mitchell, as commissioner, and at that sale J. R. Rob-

Digitized by Google

inson became the purchaser, and he sold and transferred his bid to T. A. Crouch, the husband of Virginia Rhoades, one of the children of Walker Rhoades, deceased, and the commissioner made Crouch a deed to the remainder interest. Afterwards, Crouch and wife sold and conveyed to appellant, Penn, this interest at the price of $175. Mrs. Gabehart, the widow of Walker Rhoades, remained in possession of the land from the death of Rhoades to the year 1904, when she died. One of her daughters, Nancy L. Rhoades, resided with her during that time. After the death of their mother, the children and heirs took possession of the land, claiming ownership thereof, and soon afterwards brought this action under section 11 of the Kentucky Statutes, alleging that they were the owners of the land by descent from their father; that they were in the actual possession of it; made appellant, Penn, a defendant; and alleged that he was claiming some title or interest therein, which was casting a cloud upon their title, and asked the court to adjudge that his claim to the land was without right and of no effect. Appellant answered, denying appellee's title, and asserting title in himself, and that he derived it in the way and manner above stated. Realizing that J. R. Robinson had no title, and that the heirs of Rhoades had not been divested of the legal title thereto, he alleged in his answer as follows: "That said purchase-money bond was paid off to said Sharp, administrator as aforesaid, by said J. R. Robinson, security for said Turner on said bond, and said J. N. Turner transferred and assigned said purchase to said J. R. Robinson; the original assignment and transfer cannot now be found, and, in lieu thereof, said J. N. Turner has made a transfer and assignment of said purchase and showing that it was

Digitized by Google

for said J. R. Robinson, and that he, Turner, has no interest or claim on said land, but assigns and transfers all of his said purchase to J. R. Robinson, and that the original sale and purchase by him was made for the use and benefit of said J. R. Robinson, which said assignment is filed herewith, marked 'J. N. T.'" He filed with his answer the transfer and assignment by J. N. Turner, the reputed purchaser at the commissioner's sale, which reads as follows: "Whereas, in the action in equity pending in the Taylor circuit court of Cable Cox, administrator of Walker Rhoades, deceased, plaintiff, v. Eliza Gabehart, etc., defendants, the remainder interest in the 134 1-2 acres of land that had been allotted as dower to said Eliza Gabehart was sold by the commissioner to J. N. Turner for the price of fifty ($50.00) dollars, for which amount said Turner, together with J. R. Robinson as his surety, executed bond to said commissioner, and by the judgment of said court William Sharp, as administrator of James G. Sharp, deceased, was adjudged the benefit of said bond, and entitled to collect same, and to credit same on the indebtedness of said estate to him as the administrator, and whereas the transfer of the purchase from J. N. Turner to said J. R. Robinson has been lost or misplaced, therefore, this is to show that said purchase was made by me for the benefit of said J. R. Robinson, and that I assign and transfer my interest and said purchase of land to J. R. Robinson, and direct the deed to same to be made to said J. R. Robinson or to John Penn, who now owns said land, claiming under the title of said Robinson as the court may determine. Said purchase money bond was paid by said J. R. Robinson, and he is entitled to the benefit of said purchase, and I assign and transfer all of my right and interest in said purchase to said J. R. Robinson, and those claim-

Digitized by Google

ing under him. Witness my hand this 4th day of April, 1904. J. N. Turner."

Thus it is made to appear that Turner, at the sale made in 1867, bid off the land for the commissioner, J. R. Robinson; in other words, Robinson sold the land to himself, which had the effect to make it no sale, and left the title in the heirs of Rhoades, where it was before the attempted sale. In 6 Ky. Law Rep., 365, in the case of Bagby v. Eversole, the court said: "A commissioner in chancery cannot become a purchaser at his own sale, or reap any benefit from a purchase by another under an agreement that he is to be regarded as a joint purchaser. Such contracts are against public policy." In the case of Price's Admr. v. Thompson, 84 Ky. 219, 8 Ky. Law Rep. 201, 1 S. W. 408, the commissioner of the court made a purchase of land which the court declared void, and, in the discussion of the question, used the following language, to-wit: "Officers whose powers are not merely persuasive, but coercive, ex parte, and arbitrary, should be held to strict impartiality, fidelity, and integrity in the discharge of their trusts. All temptation to make private gain, to take unfair advantage, directly or indirectly, should be removed. The most effective way to do so is to declare all such transactions conclusively invalid." To the same effect are the cases of Stapp v. Toler, 3 Bibb, 450; Smith v. Pope's Heirs, 5 B. Mon. 337; and Devers, etc., v. Dallam & Coleman, 6 T. B. Mon. 102. From these authorities it is conclusive that the purchase of J. R. Robinson, commissioner, indirectly through Turner, was, and is, void. The rule is a wise one, and should be enforced. Commissioners and trustees have frequent opportunities to advance their own interest at the expense of those

Digitized by Google

whom they represent. The temptation sometimes is great, and, if permitted to purchase under such circumstances, either directly or indirectly, injustice and injury, in the majority of cases, would be the result; therefore, it is the policy of the law to prohibit it altogether by declaring their purchases void.

Appellant's counsel, in his brief, virtually conceded this principle to be correct, and the legal title remained in the appellees, the heirs of Rhoades; but he contends that they are estopped from claiming the land, for the reason that they resided in the vicinity of this land from the time of the sale made by Robinson until appellant became the purchaser, and made no objection to the several sales and transfers of the land from Robinson to the widow, from Robinson to Crouch, and from Crouch to him. This plea in estoppel cannot be maintained; the appellees were not parties to either of these transactions, or the action of Hubbard v. Mrs. Gabehart. There is no pretense that they deceived or misled appellant in any way, or induced or consented to his purchase of the land. See the case of McAdams, etc., v. Hawes, 9 Bush, 15. In 16 Cyc. 726, it is said: "In order to constitute an equitable estoppel there must exist a false representation or concealment of material facts; it must have been made with the knowledge, actual or constructive, of the facts; the party to whom it was made must have been without knowledge, or the means of knowledge, of the real facts; it must have been made with the intention that it should be acted upon, and the party to whom it was made must have relied on or acted upon it to his prejudice." It appears from the record that appellant knew the condition of the title to this property as well, if not better, than the appellees. It seems that they did not know that J. R. Robinson had purchased the land, at

Digitized by Google

the sale made by him, until appellant filed his answer in this action. The record in the action, in which Robinson filed his report of sale showed that the legal title was in the appellees, but that the equitable title was in J. N. Turner. This was as patent to him as it was to the appellees.

The third, and last, contention of appellant's counsel is that the court erred in not sustaining the plea of the statute of limitations. This cannot avail him, for the reason that the rule has been announced that the statute of limitations does not begin to run against a remainderman until the termination of the life estate, when the right of entry accrues to the remainderman. See Francies v. Wood, 81 Ky. 16, 4 Ky. Law Rep. 616, and Jeffries v. Butler, 56 S. W. 979, 22 Ky. Law Rep. 226. The lower court by its judgment in this case attempted to settle the matter on equitable principles, and required the appellees to refund to the appellant the $50 paid on the purchase price of the land, with its interest from 1867, and considered that the conveyance by T. A. Crouch and his wife, Virginia, who was the daughter of Rhoades, and, as such, owned one-seventh interest in the land, passed the title to that one-seventh to appellant, and permitted him to retain this one-seventh interest, and adjudged that appellant had no valid claim or interest in and to the other six-sevenths of the land, save a lien for the $50 with its interest.

In view of all the facts and circumstances appearing in the record, we are unwilling to disturb this judgment.

For these reasons, the judgment of the lower court is affirmed.

Digitized by Google

CASE 102.—ACTION BY LENA GIBONEY AGAINST THE CINCINNATI, NEW ORLEANS & TEXAS PACIFIC RY. CO. FOR DAMAGES FOR PERSONAL INJURIES.—March 5.

Cincinnati, N. O. & T. P. Ry. Co. v. Giboney

Appeal from Boyle Circuit Court.

W. C. BELL, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Damages—Personal Injury—Measure of Damages.—Where, in an action for a personal injury, there was no allegation of loss of time or expense, the measure of damages was a reasonable compensation for the mental or physical suffering endured, and for the permanent impairment of power to earn money proximately resulting from the injury, and an instruction to find for plaintiff such an amount as would reasonably compensate her for any temporary or permanent injury sustained, and any suffering or pain endured, was erroneous.
2. Carriers—Personal Injuries—Condition of Premises—Negligence.—A railroad must maintain its stations and platforms in a reasonably safe condition for passengers taking passage on its trains or coming to the stations for that purpose.
3. Same—Persons to Whom Liable.—A husband and wife, with their two children, went to a station to take a train. On being unable to obtain a seat in the train, they alighted and placed one of their children on the train for the purpose of sending him home with relatives. The child began to scream on finding that his mother was not going to get on and she, on starting to take the child from the train through a window, stepped into a hole and was injured. The hole was in the pathway used by persons taking and leaving the train. Held, that the wife had not lost her right to be where she was at the time of the injury, and was entitled to recover, if she exercised ordinary care.

Digitized by Google

CHAS. H. RODES and JOHN GALVIN for appellant.

ROBERT HARDING, EMMETT PURYEAR and GREENE & VANWINKLE for appellee.

OPINION OF THE COURT BY JUDGE HOBSON—Reversing.

In September, 1904, Mrs. Lena Giboney, with her husband and two children, went from McKinney to Somerset on a round-trip ticket over the railway of the Cincinnati, New Orleans & Texas Pacific Railway Company to attend the Pulaski county fair. On the afternoon of the last day of the fair she and her husband and the two children came to the station for the purpose of going home. The train was to leave at 6 o'clock. A train going south was on the track next to the platform. The train going north, which she was to take, was on the second track from the platform, and they walked across the main track to the space between that track and the next for the purpose of taking their train. Upon an examination of the train they found it so crowded that they could not get a seat, and concluded not to take the train, but to wait until the next morning. Mrs. Giboney's father and mother were on the train. She was not very well, and concluded to send the older child, who was nine years old, home with them, so that she would only have one child to care for that night. Her husband picked up the little fellow and put him through the window of the coach. She stood by the side of the coach talking to some friends. When the train was about to pull out, the child screamed, and apprehension was felt that he would go into convulsions. So he was handed out through the window by a friend. Mrs. Giboney had just started to leave, and, when she heard the child scream, turned around, and, when

Digitized by Google

she saw him in the window, went to take him. In going to take the child she stepped into a waterbox which had been left open in the space between the two tracks, and fell, severely spraining her ankle. To recover for this injury she brought suit, and, having secured a verdict and judgment for $2,000, the railroad company appeals.

The car in which they placed the child was the rear car of the train. She was near the rear end of the car when the child screamed, and the child was only a few feet from her. The water box was in the space that the passengers would use in passing along the cars to get on the train, and Mrs. Giboney would perhaps have seen the hole which was about a foot deep if she had looked down and had not been looking up at the child as she advanced to take him, although there is some testimony that the light was not good. The court instructed the jury as follows:

"(1) If you believe from the evidence that the plaintiff held a ticket that entitled her to travel as a passenger upon the defendant's train from Somerset to McKinney on the afternoon of the accident, and that she went to the depot at the place provided for boarding said train with the intention of taking said train, and with such intention she went to said train, and then concluded not to take same, and in undertaking to leave she stepped into a hole or water box that was made or permitted by defendant to be or remain open at or unreasonably near to the place provided for passengers to board said train, and that thereby she sprained or dislocated her ankle, then you should find for her such an amount in damages as will reasonably compensate her for any temporary or permanent injury she sustained and any suffering or pain she endured, not exceeding the sum of $2,000,

Digitized by Google

and, if you do not so believe, then you should find for the defendant.

"(2) However, if you believe from the evidence that, after plaintiff concluded not to board said train, she approached the same for another purpose than that of boarding said train as a passenger, and that in so approaching said train she stepped into the hole or water box, then the law is for the defendant, and you should so find.

"(3) If you believe from the evidence that, at the time and place the plaintiff received the injuries complained of, she herself was guilty of such negligence and want of care as a person of ordinarily prudent habits would exercise under like conditions, and that but for which she would not have received the injuries complained of, or that such negligence and want of care, if any, contributed to the injury complained of, and but for that the accident would not have happened, then, in that event, the law is for the defendant, and you will so find."

The instructions did not correctly state the law of the case. The measure of damages given in instruction 1 is erroneous. In lieu of this part of the instruction, the court should have told the jury that, if they found for the plaintiff, the measure of damages was a reasonable compensation to her for the mental and physical suffering which she endured, if any, or the permanent impairment of her power to earn money, if any, which was the natural or proximate result of her injury. Lexington Ry. Co. v. Herring, 96 S.W. 558, 29 Ky. Law Rep. 794; L. & N. R.R.Co. v. Hall, 115 Ky. 579, 74 S.W. 280, 24 Ky. Law Rep. 2487; L. & N. R.R. Co. v. Logsdon, 114 Ky. 746, 71 S. W. 905, 24 Ky. Law Rep. 1566; South Covington, etc., Ry. Co. v. Nelson (Ky.), 89 S. W. 200, 28 Ky. Law Rep. 287. There was no allegation of loss of time or expense,

Digitized by Google

and therefore these matters, under the pleadings, were properly omitted from the instruction.

We see no objection to instruction 3. but instructions 1 and 2 do not present the law applicable to the case. In lieu of them the court should have instructed the jury that it was incumbent upon the railroad company to maintain its station and platforms in a reasonably safe condition for passengers taking passage upon its trains or coming to the station for that purpose, and that, if they believed from the evidence that the space between the two trains which was to be used by persons taking the train going north was not reasonably safe for that purpose, and that Mrs. Giboney was upon this space either for the purpose of taking the train herself or of putting her child upon the train or taking him from the train, she was where she had a right to be, and if she was injured by reason of the space between the two trains not being reasonably safe for the purposes indicated, while exercising ordinary care for her own safety, they should find for the plaintiff.

The evidence is clear that she and her husband went to the train with their two children for the purpose of going home; that they got on the train, and, being unable to get a seat, got off; and that they then placed the little boy on the train for the purpose of sending him home with his grandparents. The child began to scream when he found his mother was not going to get on, and this was about the time the train was starting. Mrs. Giboney had not lost her right to be on the platform, and when the child screamed she had a right to take him from the window, as that was the most practicable way to get him off the train. It was incumbent upon the railroad company to have a reasonably safe platform for the use of the passengers on this crowded train or for the use of those assisting

Digitized by Google

passengers on or off who required assistance from age or infirmity. In 3 Thompson on Negligence, section 2685, the rule is thus well stated: "This duty extends to passengers who are rightfully upon the premises of the carrier when the injury takes place—as, for example, to a passenger who has just come into the railway station, from another train, and who is injured by being struck by a car projecting over the station platform; and to a passenger who, in the course of the transit, temporarily leaves the carrier's vehicle for a proper purpose, as where a passenger on a steamboat goes ashore for a meal at an intermediate stopping place. Nor is this duty confined to passengers merely, but, upon an analogy elsewhere stated, it extends to the protection of persons coming to the station of the carrier to meet their friends arriving on his vehicle, or to see them safely off." In Tobin v. Portland, etc., R. R. Co. (Me), 8 Am. Rep. 415, a hackman who carried persons to and from a railroad station was held entitled to recover for an injury from a defect in a platform. In Hamilton v. Texas & Pacific R. R. Co. (Tex. Sup.), 53 Am. Rep. 756, the plaintiff, who had gone to the station to assist two old people who were there to take the train, and stepped in a hole, receiving injuries, was held entitled to recover. The same principle was applied in McKone v. Michigan Central R. R. Co. (Mich.), 17 N. W. 74, 47 Am. Rep. 596, where the plaintiff was waiting at the station for his wife, whom he expected on the train. To same effect, see Toledo, etc., R. R. Co. v. Grush (Ill.), 16 Am. Rep. 618; L. & N. R. R. Co. v. Wolfe, 80 Ky. 82, 3 Ky. Law Rep. 576; note to Dowd v. R. R. Co. (Wis.), 54 N. W. 24, 20 L. R. A. 527, 36 Am. St. Rep. 917.

Digitized by Google

Judgment reversed, and cause remanded for a new trial.

CASE 103.—ACTION BETWEEN DAVID HOWARD AND OTHERS AND JANE COLE AND OTHERS FOR A CONSTRUCTION OF THE WILL OF W. H. COLE, DECEASED.—March 5.

124 812
136 761

Howard, &c., v. Cole, &c.

Appeal from Mason Circuit Court.

JAMES P. HARBESON, Circuit Judge.

From the judgment Howard, &c., appeal.—Reversed.

1. Wills—Construction—Disposition of Entire Estate.—Where a will is susceptible of two constructions the law will place on it that construction which disposes of the entire estate of the testator.
2. Same—Giving Effect to Whole Will.—To arrive at the intention of a testator his entire will must be taken into consideration, and each clause thereof must be read in connection with the others.
3. Same—Estates Acquired—Life Estate.—A testator directed that his personalty should be sold to pay debts, declared that if the same was insufficient therefor the executrix should sell described real estate, and gave to his wife "during her natural life" all his real and personal etsate "to own and do with as she pleases," and appointed her executrix. Held that, reading the quoted phrases together in connection with the direction of the executrix to sell certain real estate, the wife acquired only a life estate, with the remainder undisposed of.

Digitized by Google

HOLMES & ROSS, attorneys for appellants.

J. H. MINOGUE of counsel.

1. It is well settled that in interpreting wills the cardinal principal is to arrive at and carry out the intention of the testator if it be lawful, and that the intention of the testator must be gathered from a consideration of the whole will together, giving to each part or clause due weight as expressing some idea of the testator in the disposition of his property.

2. We construe the phrase, "to own and do with as she pleases," with reference to the express interest for life previously given to Jennie or Jane Cole, that she is to have as full, free and absolute ownership and use of said property as a tenant for life can have.

3. We submit that a man may, by his last will and testatment, give to his wife or other person, a life estate in his realty and personalty without in said will disposing of the remainder interest, and that if he does create a life estate in the property left by him, and does not dispose of the remainder interest, that said remainder interest passes and descends to his lawful heirs; and we further submit that a will giving all the testator's estate to his wife, "for and during her natural life," gives her only a life estate therein, though it makes no other disposition of the said estate, and the remainder will descend to his legal heirs.

AUTHORITIES CITED.

Bedford, et al., v. Bedford's Adm'r, 99 Ky., 284; Loeb v. Struck, 19 Ky. Law Rep., 935; Daniel R. Brant v. The Virginia Coal and Iron Company and Jane Sinclair, 93 U. S. Supreme Court Rep. (L. Ed., 927.)

C. D. NEWELL, counsel for appellee.

C. B. TAYLOR of counsel.

1. The intention of testator as revealed by his environment and the common use meaning of the words employed:— The language used in the devise to his wife was not technical, save as to the phrase "during her natural life." It is upon a technical construction of this phrase, rather than a common conception of its meaning as revealed in the context in which the phrase is used, that appellants base their whole contention in this matter. This phrase read in a common and not professional sense, and in connection with the rest of the language in the same sentence,

Digitized by Google

the whole seems to declare the purpose of testator to be that his wife was not only to have all his property, but that it was to be her's as long as she lived, and in the lay sense she could not hold it any longer—to own and do as she pleased with it.

2. The intention of testator as interpreted by the rule followed in Kentucky concerning the vesting of estates:—

Appellee contends that the will in controversy in its entirety—whether read in the light of the environment of testator at time it was made and in the common acceptation of the language used therein, or it be put to the test of the rules of legal construction duly considering that it provides no remainder over, and that the law presumes that testator intended to devise his whole estate, and further, in view of the settled policy in Kentucky, that in case of doubt, uncertainty or seeming conflict, the law favors the vesting of an absolute rather than a life estate—gives to appellee the absolute estate in both realty and personalty.

CITATIONS.

Bedford, et al., v. Bedford's Adm'r, 99 Ky., 284; Loeb v. Struck, 19 Ky. Law Rep., 935; Brant v. Virginia Coal & Iron Co., &c., U. S. Supreme Court Rep., L. Ed., 927; Page Wills, sec. 560; King v. Ackerman, U. S. Supreme Court Rep., L. C. P. Ed., B. 17, p. 297; Kentucky Statutes sec. 2342; Jackman, &c., v. Jackman, 24 Ky. Law Rep., 2245; Dills v. Adams, &c., 19 Ky. Law Rep., 1169; Constantine v. Moore &c., 23 Ky. Law Rep., 369; Smith v. Smith & Co., 24 Ky. Law Rep., 1964; Miller v. Tilton, 20 Ky. Law Rep., 1676; Page on Wills, sec. 562.

OPINION OF THE COURT BY JUDGE LASSING—Reversing.

W. H. Cole died testate, a resident of Mason county, and a question arising as to the interest which his wife, Jane Cole, took in his estate under his will, suit was filed in the Mason circuit court for a construction of the will and a determination of the rights of Jane Cole, widow of the deceased, thereunder. The will, omitting the formal portions thereof, is as follows: "First. It is my will and desire that so much of my personal property, preferring that which is perishable, as may be necessary, be sold

Digitized by Google

immediately after my decease, and the proceeds thereof applied to the payment of all my just debts and funeral expenses. Should my personal property not be sufficient for that purpose, then I authorize my executrix hereinafter named to sell and convey my dwelling house and lot in Mayslick and my wagon shop and lot in said town, and out of the proceeds thereof, pay and satisfy such of my just debts as may remain unpaid. Second. After the payment of my debts and funeral expenses as above provided for I give and bequeath to my wife, Jennie Cole, during her natural life all my real and personal estate of every kind and description to own and do with as she pleases. And, lastly, I do hereby constitute my wife, Jennie Cole, executrix of this my last will and testament, without security," etc. W. H. Cole left no children. His nearest of kin are his half-brothers and sisters. It is the contention of these relatives that, under the will, Jane Cole, designated in the will as Jennie Cole, takes only a life estate in the property, with a right to use this life estate as she pleases, and that at her death it passes, by the laws of descent, as undevised estate, to his heirs at law, to-wit, the plaintiffs and the defendant Chris A. Howard. On the other hand, it is the contention of the widow and executrix that under the will of her husband she is the absolute owner in fee of all the estate left by him, after the payment of his debts as provided for in his will. The pleadings disclose the fact that the real estate left by decedent is of the value of probably $2,500. Where a will is susceptible of two constructions, it is the policy of the law to place upon it that construction which disposes of the entire estate. The rule is thus stated in Page on Wills, section 466: "Under ordinary circumstances a man makes a will to dispose of his entire estate, or, at least, of his estate

Digitized by Google

as it exists at the time he makes the will. If, therefore, a will is susceptible of two constructions, by one of which the testator disposes of the whole of his estate, and by the other of which he dies intestate as to the remainder, the courts will prefer the construction by which the whole of testator's estate is disposed of, if this construction is reasonable and consistent with the general scope and provisions of the will." This rule has been adopted and followed in the construction of wills by courts of last resort in most of the States, and is the rule in this State. But it is equally true that, where the testator has not disposed of his entire estate by will, courts cannot and should not, under the guise of construction, make a new or corrected will for the testator in order to pass such property so undisposed of by him. The real question in each case is not, "What did the testator mean or intend to say?" but, "What is meant by what he said?" Courts may frequently be of opinion that he did not intend to say what he did say, but they are not thereby authorized to give to the will any construction other than that which is justified by a fair interpretation of the wording and language of the will itself. In Bingel v. Volz (Ill.), 31 N. E. 13, 16 L. R. A. 321, 34 Am. St. Rep. 64, the court said: "The purpose of construction, as applied to wills, is unquestionably to arrive, if possible, at the intention of the testator, but the intention to be sought for is not that which existed in the mind of the testator, but that which is expressed in the language of the will." In order to arrive at the intention of the testator, the entire will must be taken into consideration. Each part or clause thereof must be read in connection with the other parts; as said in the case of Bedford, etc., v. Bedford, 99 Ky. 284, 35 S. W. 929, 18 Ky. Law Rep. 193: "The intention of the testator,

Digitized by Google

as gathered from his entire will, must prevail, if not opposed to some positive provision of the law, or some general principle of public policy."

Applying these well-established rules of construction to the will before us, what estate did the testator give to his wife? In the first clause thereof he directs the payment of his debts and funeral expenses, and he gives explicit directions as to the manner in which the executrix shall proceed: First, that the perishable personal property shall be sold and the proceeds applied to the discharge of his debts, and in the event that a sufficient sum of money is not realized by this sale, then the executrix is directed to sell certain real estate in the town of Mayslick. In the second clause of the will the rest and residue of the estate is given to his wife during her natural life, and if the will stopped with these words, there would be no question whatever but that the testator intended his wife to take the life estate only, but the gift and bequest to his wife "for and during her natural life," is qualified by the phrase, "to own and do with as she pleases." This last phrase, in the absence of any devise to her for life, and in the absence of any other qualifying clause, would give to the wife the personalty remaining unused in the satisfaction of debts, absolutely, and the fee simple to the real estate. But the second clause of the will must be read in connection with the first clause. In the first clause we find that the executrix is empowered to sell certain real estate in the event that it should become necessary to do so to pay his debts. A fair interpretation of this clause of the will is that the executrix is not empowered or authorized to sell any real estate whatever, except it should become necessary to do so for the payment of his debts. This construction placed upon the first clause

Digitized by Google

must be carried over into and read as and made a part of the second clause of the will, and, read together, then the entire will provides as follows: "After my death I direct the payment of my debts and funeral expenses. I give all of my property of every kind and description to my wife, Jennie Cole, to own and do with as she pleases, and I direct her in the event that there is not enough money realized out of my personal estate to satisfy my debts and funeral expenses, to sell my Mayslick real estate to satisfy the balance of my debts that may remain unpaid." This is the only construction that can be placed upon the will that will give any force and effect to that clause thereof which directs a sale of particular real estate for a particular purpose. Appellees rely upon the case of Dills v. Adams, etc., 43 S. W. 680, 19 Ky. Law Rep. 1169, in which case this court, in construing this language of the will of John Dills, to-wit, "After all my just debts are paid I will all my real estate consisting of lands, lots, and all my personal assets to my beloved wife Anna Dills, which is to include dues of every kind and all my personal property of every kind, live stock, household furniture, books, etc., and to have and to hold ——— her natural life for her support and maintenance, and to be disposed of at her pleasure," said: "Looking to the intention of the testator and plan adopted for disposing of his estate, it is plain that the wife is entitled to the absolute fee in all the lands other than the particular tracts excepted." It will be observed that there is a marked difference between the provisions of the will in the case before us and the provision of the Dills will, for in the Dills will the wife is given authority "to dispose of all the property at her pleasure." And she is not directed to sell any particular part thereof for any particular purpose. Appellees also cite the case of

Digitized by Google

Constantine v. Moore, etc., 62 S. W. 1016, 23 Ky. Law Rep. 369, but this case is not applicable, for in the Constantine will express power is given to the wife to dispose of the property at her death, which clause, of itself, shows conclusively that the testator intended her to have the fee, although it was recited in another part of the will that she was to control the estate during her lifetime. Appellees further rely upon the case of Smith v. Smith, 72 S. W. 766, 24 Ky. Law Rep. 1964, but in the Smith will there is this recitation: "I give to my wife, M. E. Smith, all of my estate which I now own or may acquire, in fee simple, to hold and possess during her natural life." The court very properly held that the wife took the fee. The plain wording of the will is that she shall take the fee, and the clause that she was to take a life estate, when read in connection with the other clause that she was given the fee-simple title, must give way, and that construction which the court placed upon this will was proper and warranted by the facts. Thus it will be seen that in each of the cases relied upon by appellees to support their contention there was some qualifying clause in the will, such as the statement that it was given in fee simple, or that the wife was given power to dispose of it at her death, or that she was given the right to dispose of it at her pleasure during life, which warranted the conclusion reached by this court in those particular cases that the widow took a fee simple title under the will of her husband, although each of those wills contained the phrase "to have during her natural life." Appellees have cited no case, nor have we been able to find one, in which this court was ever called upon to construe a will with provisions exactly similar to the one before us. We are therefore limited to the rules laid down in the text-books, and as adopted by courts of last resort,

Digitized by Google

for the construction of wills; that is to say, the will must be constructed as a whole, and the usual, customary, and accepted meaning given to the words and language thereof; bearing in mind that where it can be done, that construction should be placed upon it which would dispose of the entire estate.

Adopting this rule, we are of opinion that the widow, Jane Cole, took only a life estate in the realty left by her husband. This construction is supported by the case of Brant v. Virginia Coal & Iron Company, 93 U. S. 327, 23 L. Ed. 927, in which the following language in the will of Robert Sinclair, was under consideration: "I give and bequeath to my beloved wife, Nancy Sinclair, all of my estate, both real and personal; that is to say, all of my lands, cattle, horses, sheep, farming utensils, household and kitchen furniture, with everything that I possess, to have and to hold during her life and to do with as she sees proper before her death." The complainant in that suit contended that the widow took only a life estate in the property, whereas it was contended for the widow that she took the absolute fee, and the court said: "We are of the opinion that the position taken by the complainant is the correct one; the interest conveyed by the devise to the widow was only a life estate; and the accompanying words, 'to do with as she sees proper before her death,' only confer power to deal with the property in such manner as she might choose consistently with that estate, and perhaps without liability for waste committed. These words used in connection with a conveyance of a leasehold estate would never be understood as conferring a power to sell the property so as to pass a greater estate. Whatever power of disposal the words confer is limited by the estate with which they are connected." And in that same case the court quoted with approval the

Digitized by Google

case of Bradley v. Westcott, 13 Vesey, 445, in the following language: "In the case of Bradley v. Westcott, reported in 13 Vesey, 445, the testator gave all his personal estate to his wife for her sole use for life, to be at her full, free, and absolute disposal during life, and the court held that as the testator had given in express terms an interest for life, ambiguous words afterwards thrown in could not extend that interest to the absolute property. 'He must construe,' said the master of rolls, 'the subsequent words with reference to the express interest for life previously given, that she is to have as full, free, and absolute disposition as a tenant for life can have.' "

Under a fair and reasonable construction, therefore, of the will before us, the wife, Jane Cole, or Jennie Cole, as she is called in the will, takes an estate for life in all of the property which passed under the will of her husband to her, and she is to have as full and free use of said property as a tenant for life can have Full force and effect must be given to the phrase, "for and during her natural life." The testator means something by the use of this phrase. It is true that it is qualified by the further phrase, "to own and do with as she pleases," but when the two are read together, and especially in connection with paragraph 1 of the will, the purpose of the testator is plain. He intended to give to his wife the free use and enjoyment of all his estate during her life, and while this construction of the will before us leaves the remainder or fee of this estate undisposed of, still, it is not the province of the court to dispose of it for him, nor is it the policy of the law that this should be done.

Judgment is reversed, and cause remanded, with instructions to the trial court to enter a judgment giving the wife, Jane Cole, a life estate in all of the real estate left by her husband.

Digitized by Google

Petition by appellants for modification of opinion, and by appellees for a rehearing, both overruled.

CASE 104.—ACTION BY LOU TERRELL AGAINST THE POSTAL TELEGRAPH CABLE CAMPANY FOR DAMAGES FOR FAILURE TO DELIVER A TELEGRAM.—March 5.

124 822
e127 141
124 822
138 504

Postal Telegraph Cable Co. v. Terrell

Appeal from Jefferson Circuit Court, Common Pleas Branch, (Third Division).

J. M. CHATTERSON, Special Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

Telegraphs and Telephones—Failure to Deliver Telegram—Damages—Mental Suffering.—Where a telegram showed on its face that it must be delivered on the evening on which it was sent to apprise the addressee of the coming of his daughter on a train at midnight, and that the addressee's residence was about 3 miles from the station, the telegraph company, on failure to deliver, was liable for mental anguish suffered by the addressee's daughter, resulting from her being compelled to remain in the station until the street cars commenced to run in the morning.

LEOPOLD & PENNEBAKER for appellant.

POINTS AND AUTHORITIES.

1. Where a telegram for addressee to meet a person at the depot in Memphis, Tennessee, was not delivered in time, the fact that the one to be met remained in the depot all night can be no basis for a cause of action, on account of remoteness and

Digitized by Google

because such damages could not have been in contemplation of the parties. (Hadley v. Baxendale, 9 Exch., 341; Stafford v. W. U. Tel. Co., 73 Fed. Rep., 273; W. U. Tel. Co. v. Bryant, 46 N. E. R., 358; McAllen v. Tel. Co., 70 Tex., 243; Tel. Co. v. Smith, 13 S. W. R.., 169; Gaddis v. W. U. Tel Co., 77 S. W. R., 37; Smith v. W. U. Tel. Co., 83 Ky., 104; Talliferro v. W. U. Tel. Co., 21 Ky. Law Rep., 1290; Chapman v. W. U. Tel Co., 90 Ky., 265; W. U. Tel. Co. v. Patton, 55 S. W. R., 973; McBride v. Tel. Co., 96 Fed., 81.)

2. Mental anguish, unaccompanied by physical suffering, cannot be a basis for a cause of action in Kentucky, except where one is deprived of attending the death-bed or funeral of a near relative. (W. U. Tel. Co. v. Steenberger, 21 Ky. Law Rep., 1289; Davidson v. W. U. Tel. Co., 21 Ky. Law Rep., 1292; W. U. Tel. Co. v. Herning, 24 Ky. Law Rep., 1433; W. U. Tel. Co. v. Fisher, 21 Ky. Law Rep., 1293; W. U. Tel. Co. v. Davis, 107 Ky., 527; W. U. Tel. Co. v. Parsons, 21 Ky. Law Rep., 2008; W. U. Tel. Co. v. Smith, 15 Ky. Law Rep., 334; Chapman v. W. U. Tel. Co., 90 Ky., 265; Pos. Tel Cab. Co. v. Pratt, 85 S. W. R., 225; W. U. Tel Co. v. Vancleave, 22 Ky. Law Rep., 53; W. U. Tel. Co. v. Cross, 25 Ky. Law Rep., 270; Robinson v. W. U. Tel. Co., 24 Ky. Law Rep., 453; Reed v. Maley, 25 Ky. Law Rep., 209; Hockenhammer v. L. & E. R. R. Co., 74 S. W. R., 222; Amer. Nat. Bank v. Morey, 24 Ky. Law Rep., 658; 2nd Thompson on Negligence, sec. 2470; W. U. Tel. Co. v. Reid, 85 S. W. R., 1171; Joyce on Electric Law, sec. 827, 830.)

3. A verdict of five hundred dollars in a case where plaintiff unnecessarily waited four hours in a railroad station, when she could have gone to a hotel or taken a carriage, must be the result of passion or prejudice.

4. In the case at bar, if there could be any recovery at all, the court should have limited the recovery to the price of the telegram and the amount plaintiff would have had to pay for lodging or cab fare. (W. U. Tel. Co. v. Campbell, 81 S. W. R., 580.)

BECKLEY & SCOTT for appellee.

POINTS AND AUTHORITIES.

1. The Court of Appeals of Kentucky has in every case that has come before it, sustained the right to damages for mental suffering and physical discomfort, or for mental suffering alone, occasioned by the negligence of a common carrier, where contractual relations existed between the carrier and the person injured. (Constitution of Kentucky, sec. 199; Chapman v. Western Union Tel. Co., 90 Ky., 265; Western Union Tel. Co. v. Cleaver,

Digitized by Google

13 Ky. Law Rep., 301; Western Union Tel. Co. v. McIlvoy, 21 Ky. Law Rep., 1393, Western Union Tel. Co. v. VanCleve, 107 Ky.. 464; L. & N. R. R. Co. v. Hull, 113 Ky., 561; and all other cases where the negligence of a telegraph company prevented attendance at the bedside or funeral of a near relative.)

2. The following cases in Kentucky relied on by appellant, are not in point because no contractual relations existed, and the cause of action sounded in tort alone: (Reed v. Maley, 25 Ky. Law Rep., 209; Hockenhammer v. L. & E. R. R. Co., 24 Ky. Law Rep., 2383.)

3. The following cases cited and relied on by appellant arose from business or commercial telegrams, and therefore are not in point: (Robinson v. Western Union Tel. Co., 24 Ky. Law Rep., 453; Amer. Nat'l Bank v. Morey, 24 Ky. Law Rep., 658.)

4. The words of the telegram:

"Jerry Johnson,
564 Lauderdale Street,
Memphis, Tenn.,
Meet Lou at I. C. depot to-night.
GEORGE E. TERRELL."

put the telegraph company on notice that its non-delivery would cause mental and physical suffering and inconvenience. (Chapman v. Western Union Tel. Co., 90 Ky., 265; Western Union Tel. Co. v. Cleaver, 13 Ky. Law Rep., 301; Western Union Tel. Co. v. McIlvoy, 21 Ky. Law Rep., 1393; Western Union Tel. Co. v. Reid, 27 Ky. Law Rep., 659.) And the other cases in Kentucky where the death of a relative or funeral was involved. (Wadsworth v. Western Union Tel. Co., 86 Tenn., 695; Mentzer v. Telegraph Co., 93 Iowa, 752; Stevens v. Dudley, 56 Vermont, 158; Darlington v. Western Union Tel. Co., 127 N. C., 448; Young v. Western Union Tel. Co., 107 N. C., 370; Western Union Tel. Co. v. Simpson, 73 Texas, 422; Stone v. Sou. California R. R. Co., 111 Cal., 668; Western Union Tel. Co. v. Burgess, 56 S. W., 237; Sutherland on the Law of Damages (ed. 1903) vol. 1, p. 41; —— vol. 3, p. 2882; and cases cited. Shearman & Redfield on Negligence, 5 ed. sec. 756, p. 1301; Thompson on Negligence, vol. 2, sections 2456 and 2471; and cases cited.)

5. A verdict for $500 is not excessive. (Opinion of Trial Judge; Sutherland on Damages, vol. 3, section 2806, p. 953; vol. 1, section 96, p. 281; L. & N. R. R. Co. v. Cayce, 17 Ky. Law Rep., 1389; Chesapeake, &c.. R. R. Co. v. Osborn, 97 Ky., 112; I. C. R. R. Co. v. Latimer, 28 Ill. App., 552.)

6. The instructions of the court were more favorable to appellant than appellee.

Digitized by Google

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

Mrs. Lou Terrell, the wife of George E. Terrell, of Louisville, left Louisville on January 28, 1903, at 12 m. on the Illinois Central train to go to her father's home at Memphis, Tenn. The train, if on time, would reach Memphis at 12:1 that night. At 6:30 that evening her husband sent to her father the following telegram: "Louisville, Ky., January 28, 1903. Jerry Johnson, 564 Lauderdale St., Memphis, Tenn. Meet Lou at I. C. depot to-night. George E. Terrell." At the time the message was sent the clerk told Terrell that the message would go through in 20 minutes. It did reach Memphis in due time, but was not delivered. Mrs. Terrell's train reached Memphis two hours late, or about 2 o'clock in the morning. She had been summoned to Memphis on account of the sickness of a sister, and expected some of the family to meet her. She had with her two little children, aged three and one years. Her father lived about three miles from the station, and to get to his house it was necessary to pass through the red light district and the residence part of the city. When nobody met her, she went in the station and remained there with her children until 6 o'clock, when she took a street car and went home. The street cars had stopped running at 12 o'clock, and she testified that she would not like to trust herself through at that time of night in a cab or hack; that the Patterson Company is a transfer similar to the Louisville Transfer Company, but she did not communicate with it; that she walked to the window, and when she saw the colored men she did not think she would trust herself with them. She had lived in Memphis and knew something of the hotels, but had never

Digitized by Google

been to any of them. Her father kept a vehicle and would have come to meet her if the telegram had been delivered. She testified that there were men dressed very rough in overalls with trousers tucked in their boots, lying on the floor of the depot, and that she was worried and frightened, and suffered mental anguish by having to remain there until morning. The defendant introduced proof tending to show that the numbers on the streets had been changed; that the number of Johnson's house, 564, was not the number given in the directory; and that the boy who went out to deliver the message failed for this reason to find the house. There was proof, however, that Johnson had lived there 20 years, that he was well known in the city, and that he had never changed his residence or the number of his house.

On these facts the court instructed the jury as follows:

"(1) The court instructs the jury that it is admitted by the evidence of the defendant that it received the telegram specified in the pleadings and proof for delivery, and was paid in advance therefor. It then became the duty of the defendant to use ordinary diligence to deliver same to the address and party named therein, and, if you believe from the evidence that it negligently failed to deliver to the addressee or his house as per direction, then the law is for the plaintiff, and the jury should so find.

"(2) The jury is further instructed that in estimating damages, if you find for the plaintiff, you can only find in addition to the sum of 30 cents, which defendant offers to confess judgment for, such a sum as will fairly and reasonably compensate the plaintiff for such mental and physical suffering as is shown to be the direct and proximate result of the negligent fail-

Digitized by Google

ure of the defendant to deliver the said telegram, in all not exceeding the sum of $1,500.

"(3) If, however, the jury shall believe from the evidence that the defendant used ordinary diligence in its effort to deliver said telegram within a reasonable time, then it was not guilty of negligence in failing to so deliver, and, in that event, the jury should find for the plaintiff in the sum of 30 cents. It was, however, the duty of plaintiff, when her friends failed to meet her at the depot as alleged and proven, to exercise that degree of care for her own safety and comfort which ordinarily prudent persons usually exercise under like circumstances, and, if you believe from the evidence that she failed to exercise that degree of care and caution, then she cannot recover in the action for any mental or physical suffering endured by her in consequence of such failure upon her part, if any, even though you may believe the defendant was negligent as stated in instruction No. 1.

"(4)) By the term 'negligence' is meant the failure to observe ordinary care.

"(5) By 'ordinary care' is meant that degree of care usually exercised by ordinarily prudent persons under similar circumstances."

The jury returned a verdict for the plaintiff in the sum of $500, on which the court entered judgment, and the defendant appeals.

It is earnestly insisted for appellant that no recovery should be had on account of mental suffering in a case like this. It is conceded that the rule established by this court allows mental suffering as an element of damage for the failure to deliver telegrams announcing to near relatives the sickness or death of a member of the family, but it is urged that the rule has never been carried further, and should not be. There is no effort in this case to recover for

Digitized by Google

the mental suffering of the husband or father because the telegram in question was not delivered. The telegram was sent by the husband for the benefit of the wife, and the effort is to recover for her mental suffering by reason of the non-delivery of the telegram sent for her benefit. The telegram on its face showed that it must be delivered that evening, or it would be too late. It also showed that it was sent to apprise Mr. Johnson of the coming of a female at midnight, and that he must meet her at the station. It showed upon its face the residence of Johnson, and this was something like three miles from the station. It must be presumed that the agents of the telegraph company at Memphis were acquainted in a general way with the streets of the city, and with the fact that the street cars would not run after midnight. The telegram, therefore, apprised the defendant on its face of its importance. In Chapman v. Western Union Telegraph Company, 90 Ky. 271, 12 Ky. Law Rep. 265, 13 S. W. 880, this court, after discussing at some length the liability of the telegraph company for injury to the feelings for non-delivery of a telegram, concluded with these words: "In Shearman & Redfield on Negligence, section 605, it is said: 'In case of delay or total failure of delivery of messages relating to matters not connected with business, such as personal or domestic matters, we do not think that the company in fault ought to escape with mere nominal damages on account of the want of strict commercial value in such messages. Delay in the announcement of a death, an arrival, the straying or recovery of a child, and the like, may often be productive of an injury to the feelings, which cannot easily be estimated in money, but for which a jury should be at liberty to award fair damages. Yet in such cases the damages ought not to be enhanced by evidence of any circum-

Digitized by Google

stances which could not reasonably have been anticipated as probable from the language of the written message.' This seems to us to be the true rule, one which is in accord with reason, and necessary to a proper protection of individual rights and the interests of the public." In Western Union Telegraph Company v. Cleaver, 13 Ky. Law Rep. 301, a telegram was delivered to the wife which read as follows: "Come direct from the depot to our house. Lula." The message as sent was not directed to the wife, but to the husband, and was only intended to invite him, as he was coming to the city, to come straight to the daughter's house. The wife, receiving the message, thinking that the daughter must be sick, took the first train for the city. It was held that her recovery was not confined to her expenses and compensation for loss of time, but might include personal inconvenience and annoyance. In Green v. Telegraph Company, 136 N. C. 489, 49 S. E. 165, 67 L. R. A. 985, 103 Am. St. Rep. 955, a telegram similar to that before us was not delivered, and it was held that a recovery might be had for mental anguish. The court said: "A girl 16 years of age finds herself after midnight in a strange city, riding two miles in a carriage with an unknown driver. It is true she suffered no insult or physical injury, but the question is what would be the natural effect upon the mind and nervous system of a child of her age. Nature offers no flower more tender or more fair than budding womanhood, and around it every protection will be thrown by the hand of the law. The defendant was informed of the full purpose of the telegram, and the importance of its immediate delivery. It therefore remains only to consider whether, under the admitted facts, the plaintiff is entitled to recover compensatory damages for the mental anguish she may have suffered as the direct

Digitized by Google

result of the defendant's negligence. We see no reason why she cannot, and we find no authority in this State to the contrary." In that case a number of authorities are collected. See, also, Western Union Telegraph Company v. Taylor (Tex. Civ. App.), 81 S. W. 69; Western Union Telegraph Company v. Burgess (Tex. Civ. App.), 56 S. W. 237. In Western Union Telegraph Company v. Van Cleave, 107 Ky. 464, 54 S. W. 827, 22 Ky. Law Rep. 53, 92 Am St. Rep. 366, the court said: "The same difficulty of accurately measuring such damages arises in cases of slander, breach of marriage contract, and in cases where mental suffering is accompanied with physical pain. If, as argued, the law does not deal generally with the feelings and emotions, it may be answered that here the parties themselves have contracted with respect to those things, or, at least, have contracted with respect to those things which anturally affect the feelings and emotions." Then, after stating the rule that for the breach of a contract such damages may be recovered as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract as the probable result of the breach of it, the court further said: "The rule is certainly not less comprehensive if applied as a test for the ascertainment of the liability of a common carrier who may violate its public duty. The subject-matter of the undertaking by the carrier is not of a pecuniary nature, and the breach of the undertaking cannot be measured by an attempted ascertainment of what money is lost by reason of the breach." In the subsequent case of L. & N. R. R. Co. v. Hull, 113 Ky. 561, 24 Ky. Law Rep. 375, 68 S. W. 433, 57 L. R. A. 771, which was an action against a carrier to recover damages for delay in the shipment of a corpse, a recovery was allowed for mental suffering. In that case the

Digitized by Google

court said: "The damages for the loss of a corpse and those for the delay in delivering it differ only in degree. In actions for breach of a marriage contract damages for mental suffering are allowed because these are the natural result of the defendant's wrong, and in no other way can proper compensation for it be had. The same rule must apply in actions for negligence in carrying a corpse, if the carrier is to be held to proper responsibility in this class of cases."

In the case at bar the telegram apprised the defendant that mental suffering might reasonably be anticipated from the failure to deliver the telegram, and to allow mental suffering to be recovered is only to allow such damages as the parties should reasonably have anticipated to result from the breach of the contract. Telegraph companies are common carriers. They may take private property under the power of eminent domain. They are required to serve the public. When they negligently fail of their duty, they should be held to a just responsibility, and there is no reason why they should not answer for such damages as may reasonably be anticipated to result from the breach of the contract. Were the rule otherwise, no adequate recovery could be had for the non-delivery of many very important telegrams, such as one announcing the straying or finding of a child, or other social matters. The rule allowing a recovery for mental suffering in this class of cases is not confined to telegrams announcing the sickness or death of a near relative, but extends to all those cases where mental suffering may be reasonably anticipated as the natural result of the breach of the contract, and this is shown on the face of the telegram. The case of Hockenhammer v. Lexington & Eastern Ry. Co., 74 S. W. 222, 24 Ky. Law Rep. 2382, was an action for a collision between a locomotive and a wagon at a high-

Digitized by Google

way crossing. It was not an action upon contract, but was for a tort, and there was nothing to show that mental suffering to others should have been anticipated as the natural result of the locomotive striking the wagon. If that had been a case of a willful trespass to a corpse, a different question would have been presented. We therefore conclude that the court properly instructed the jury here to consider mental suffering in making up their verdict.

The court aptly told the jury that there could be no recovery for anything which Mrs. Terrell might have avoided by the exercise of ordinary care. It was thus left with the jury to determine whether in the exercise of ordinary care she should have taken a hack and gone to her father's or to a hotel for the night. The whole question of care was thus left to the jury, and, under all the proof, the verdict of the jury is not so against the evidence, or so excessive, as to warrant us in disturbing it.

Judgment affirmed.

Petition for rehearing by appellant overruled.

Digitized by Google

CASE 105.—ACTION BY G. M. MITCHELL AGAINST HENRY COUNTY FOR SERVICES RENDERED AS JAILER. —March 6.

124 833
127 10

124 833
e129 55

124 833
f131 377

124 833
138 70

Mitchell v. Henry County

Appeal from Henry Circuit Court.

R. F. PEAK, Circuit Judge.

Judgment for defendant. Plaintiff appeals. Affirmed.

1. Fiscal Courts—Jurisdiction—Contract with Jailer.—The fiscal court is one of special and limited jurisdiction and it has no power to appropriate the money of the county, except as authorized by law. There is no statute authorizing the fiscal court to make any kind of a contract with the jailer.
2. Fees of Jailer—Statute Fixing—Ex Officio Services.—The statute fixes the fees of the jailer for all services rendered by him and when as in sec. 3948, the statute requires him to superintend the public square, courthouse, clerk's office, jail, stray pen, etc., such services must be regarded as ex officio, for which no charge can be made.

MOODY & BARBOUR for appellant.

HILLIS LIST for appellee.

OPINION OF THE COURT BY JUDGE NUNN—Affirming.

This is an appeal from a judgment of the Henry circuit court declaring void an order made by the fiscal court of that county at its October term, 1906, said order reading as follows: "On motion it is ordered by the court that the jailer's salary be fixed

Digitized by Google

at the rate of $150 per year, beginning January 1, 1907, and that the court hereby appropriate $350 per year for the purpose of employing a janitor to take charge of the buildings and grounds, and that said janitorship here provided for be at the option of the jailer to accept and discharge the duties thereof subject to the directions of the county court. The several allowances payable out of any money in the sheriff's hands not otherwise appropriated, and the county clerk is authorized to certify the claims quarterly."

The only questions involved in this case are of law; and are as follows: (1) Did the fiscal court have the power and authority to allow the jailer a salary in lieu of the fees allowed him by statute? (2) Did the fiscal court have the authority to appropriate $350, or any sum, to pay a janitor for his services in "taking charge of the public buildings and grounds?" The fiscal court is one of special and limited jurisdiction. It has no power to appropriate money of the county, except as authorized by law. See Morgantown Deposit Bank v. Johnson, 56 S. W. 825, 22 Ky. Law Rep. 210. There is no statute authorizing the fiscal court to make any kind or character of contract with the jailer. The jailer is elected by the people, the statute fixes his allowances and fees for all services rendered by him, and the court has no power to change or allow them in any other manner. Ky. Stat., 1903, sections 356, 1730. Section 3948 of the Kentucky Statutes of 1903 provides as follows: "The jailer of each county shall be superintendent of the public square, courthouse, clerk's office, jail, stray pen and other county buildings at the seat of justice." But there is no provision of the statute authorizing payment to him for such services. By section 1749 of the statutes it is provided: "No fee bill shall be made out or compensation allowed hereafter for any ex-officio services rendered

Digitized by Google

or to be rendered by any officers." Therefore, when the statute requires services to be performed by its officers (as in section 3948) for which no remuneration is allowed, they must be regarded as ex-officio, for which no charge can be made.

Appellant contends, however, that under section 1840 the fiscal court had the power to remunerate the jailer for his services for superintending the public square, courthouse, clerk's office, etc. That section provides: "The fiscal court shall have jurisdiction to appropriate county funds authorized by law to be appropriated; to erect and keep in repair necessary public buildings, secure a sufficient jail and a comfortable and convenient place for holding court at the county seat." This statute has no application to this case. There is no doubt about the fiscal court's power to appropriate funds for the purposes mentioned; but appellant contends that this appropriation by the fiscal court was for the employment of a janitor to keep this property in repair. The order says, "A janitor to take charge of the buildings and grounds." Even if the fiscal court had power, which is not decided, to make an appropriation for repairs in the future, it was not done by the order in question, for it only made an appropriation for the performance of a duty required of the jailer under section 3948.

But it is contended that repairs would include the sweeping of the floors in the courthouse building. We do not so understand it; and there is no authority for the court to make an appropriation for the payment of such services. In the case of Wortham v. Grayson County Court, 13 Bush, 53, this court said: "It is sufficient answer to state that the State and county governments of this country never become debtors by implication to any of their agents and that in order to hold them, or any of them, responsible for a claim, the

Digitized by Google

claimant must show a legal obligation on their part to pay it." This may seem a great hardship on a person who performs the services; but the remedy is with the General Assembly.

For these reasons, the judgment of the lower court is affirmed.

CASE 106.—ACTION BY CARL WILSON AGAINST THE LOUISVILLE & NASHVILLE RAILROAD CO., FOR DAMAGES FOR PERSONAL INJURIES.—March 6.

124 836
f130 766

Louisville & N. R. R. Co. v. Wilson

Appeal from Jefferson Circuit Court, Common Pleas Branch (Second Division).

THOMAS R. GORDON, Judge.

Judgment for plaintiff. Defendant appeals. Affirmed.

1. Railroads—Accidents at Crossings—Gates.—Where a railway maintains a watchman and gates at a crossing and fails to keep the same down or give proper warning when trains are passing, it is liable to a person injured thereby who is not guilty of contributory negligence.
2. Same—Pleading and Proof—Variance.—A party cannot recover for injuries alleged to have been received at a crossing if it is shown that he was not injured while passing over the crossing, but while alighting from a freight train.
3. Same—Contributory Negligence.—A party cannot recover for injuries received at a crossing if guilty of contributory negligence.
4. Same—Failure to Look and Listen—Gates—Watchman.—The failure to look and listen for a train at a street crossing is

Digitized by Google

not per se negligence, where the railroad company keeps a watchman and gates at the crossing and the gates are up.

HELM & HELM for appellant.

H. L. STONE, B. D. WARFIELD of counsel.

On this state of the record, we submit:

1. That under the circumstances of this case, to-wit, as to a wide-awake pedestrian walking practically towards the train which struck him, that the lowering of the gates was not the only means of giving a reasonable warning of the train's approach. (Paducah & Memphis R. Co. v. Hoehl, 12 Bush, 45; C. & O. Ry. Co. v. Gunther, 21 Ky. Law Rep., 1803; I. C. R. R. Co. v. Dick, 91 Ky., 41; and cases cited below.)

2. That when the plaintiff admits he walked from 65 to 70 feet without looking or listening for a train, he was guilty of contributory negligence, and the jury had no right to find as an excuse for plaintiff that a train going south on the transfer track obstructed his view when the admitted physical facts demonstrated that this was utterly impossible, and therefore could not be true. (L. H. & St. L. Ry. Co. v. Jolly, 28 Ky. Law Rep., 992; 4 Elliott on Railroads, sec. 1703; Lake Erie, &c., R. Co. v. Stick, 143 Ind., 449; 41 N. E., 365; Herriet's estate, 145 N. Y., 540, 40 N. E., 246; Jones v. Northwestern Mutual, 90 Wisc., 332, 63 N. W., 276; Butero v. Travelers Insurance Co., 91 Wis., 536, 71 N. W., 811.)

3. That the instruction as to contributory negligence peremptorily instructed the jury to exclude practically all the evidence of plaintiff's contributory negligence on his theory as to his movements just prior to the accident. (L. & N. v. Servant, 19 Ky. Law Rep., 1578; Rupert v. C. & O. Ry. Co., 88 Ky., 280-5; L. & N. R. R. Co. v. Cumming's Adm'r, 111 Ky., 333-40; Dick v. L. & N. R. R. Co., 23 Ky. Law Rep., 1069; L. & N. R. R. Co. v. Sights, 28 Ky, Law Rep., 186; L. & N. R. R. Co. v. Cleaver, 28 Ky. Law Rep., 497; Calawalder v. L. N. A. & C. R. R. Co., (Ind.) 27 N. E., 162; Merrigan v. B. & O. R. Co., (Mass.) 29 N. E., 149; Smith v. Wabash, 40 N. E., 270; Romer v. Boston & Maine R. Co., (Me.) 23 Atl., 44; Greenwood v. P. W. & B. R. Co., (Penn.) 3 L. R. A., 44.)

JACOB SOLLINGER and D. W. BAIRD for appellee.

POINTS AND AUTHORITIES.

We submit:

1. That the facts in this case do not show any contributory

Digitized by Google

negligence on the part of appellee.

(a) Because appellee waited at the crossing until the gates were raised.

(b) The failure to look and listen for a train before attempting to cross the railroad track under the circumstances of this case does not amount to contributory negligence, as a matter of law. (Lou., &c., R. R. Co. v. Goets's Adm'r, 79 Ky., 442; Ramsey v. Lou., &c., R. R. Co., 12 Ky. Law Rep., 560; Ky. Cent. Ry. Co. v. Smith, &c., 93 Ky., 449; L. & N. R. R. Co. v. Price's Adm'r, 76 S. W., 836; Dick v. L. & N. R. R. Co., 23 Ky. Law Rep., 1068; Stegner v. Chicago, &c., R. R., (Minn.) 102 N. W., 205.)

(c) The physical facts in the evidence in this case show that it was not only possible but highly probable that a freight train proceeded south on the transfer track immediately preceding the raising of the gates and the crossing of the tracks by appellee, and where the evidence is conflicting the verdict of the jury will not be disturbed unless flagrantly against the evidence. (L. & N. R. R. Co. v. Price's Adm'r, 76 S. W., 836; L. & N. R. R. Co. v. Tucker's Adm'r, 23 Ky Law Rep., 1929; Robards v. Jenkins, et al., 76 S. W., 10, 25 Ky. Law Rep., 449; Castle v. Mercer National Bank, 22 Ky. Law Rep., 1009; Glascock v. Littell, 22 Ky. Law Rep., 29; L. & N. R. R. Co. v. Gray's Adm'r, 20 Ky. Law Rep., 79.)

2. The raising of the gates maintained by appellant at an important crossing in a densely populated city amounts to an invitation and assurance to the public that the crossing may be made in safety. (Stegner v. Chicago, &c., R. R. (Minn.) 102 N. W., 205; Chicago, &c., v. Schmintz, 211 Ill., 446, 71 N. E., 1050; Northern Cent. R. R. v. State (Md.) 60 Atl., 19; B. & O. R. R. v. Stump, 97 Md., 94 (54 and 978); N. E. Ry. v. Wanless, 7 Eng. & Irish App., 12; Stapley v. London & Brighton Ry. Co., L. R., 1, Q. B., 277; Grand Trunk Ry. v. Ires, 144 U. S., 408, 12 Sup. Ct., 679, 36 L. Ed., 485; Dolan v. Del. & Hudson Canal Co., 71 N. Y., 288; Glushing v. Sharp, 96 N. Y., 676; Palmer v. N. Y. Cent. R. R., 112 N. Y., 288; Chicago & Rock Island R. R. v. Clough, 134 Ill., 586, 25 N. E., 664, 29 N. E., 1184; Rohde v. Chicago & N. W. R. R. Co., 86 Wis., 312, 56 N. W., 872; Evans v. Lake Shore & Mich. Sou. R. R., 88 Mich., 442, 50 N. W., 286, 41 L. R. A., 223; Wilson v. N. Y. & N. H. R. R. (R. I.) 29 A., 258; Sager v. Atkinson, (Kan.) 79, p. 132; Galveston, &c., R. R. v. Foy (Tex. Civ. App.) 84 S. W., 664; Chicago, &c., R. R. v. Zapp, 110 Ill. App., 553; Chicago, &c., R. R. v. McAuraw, 114 Ill. App., 501; Lake Erie, &c., v. Fike (Ind. App.) 320; Lou. &c., R. R. Co. v. Schick, 94 Ky., 194; Ky. Cent. Ry. Co. v. Smith, &c., 93 Ky., 449; Sights v. L. & N. R. R. Co., 78 S. W., 172; Richmond v. Chi. & W. M. R. Co., 87 Mich., 374, 374, 49 N. W., 621; C. C. C. & I. R. Co. v.

Digitized by Google

Schneider, 45 Ohio St., 687, 17 N. E., 321; Woehrle v Minnesota Transfer Co. (Minn.) 84 N. W., 791, 52 L. R. A., 348; L. & N. R. R. Co. v. Sights, 89 S. W., 132; Dick v. L. & N. R. R. Co., 23 Ky. Law Rep., 1068.)

3. Appellant cannot complain of the instructions of the trial court, for by them it was only required to use ordinary care, whereas, the evidence in this case shows this crossing to be an important crossing in a large city where three or more railroad tracks cross the juncture of two streets and are constantly used and "extraordinary care must be shown on the part of the railroad company before it can be exempted from liability for injury of those who have the same right to use the streets that the company has." (Ky. Cent| Ry. Co. v. Smith, 93 Ky., 449; Lou. &c., R. R. Co. v. Schick, 94 Ky., 191; Sights v. L. & N. R. R. Co., 78 S. W., 172.)

We firmly believe that there has been no error by the lower court to the substantial rights of the appellant and therefore ask your honors to affirm the judgment of the lower court.

OPINION OF THE COURT BY JUDGE HOBSON—Affirming.

The tracks of the Louisville & Nashville Railroad Company leading from the south into Louisville cross diagonally Seventh street at and a little north of its intersection with Magnolia avenue. There are gates maintained by the company on both sides of the crossing. Seventh street at this point is a much traveled city highway; perhaps the most traveled highway leading into the city from the country. On the 11th of November, 1905, about 6 p. m. Carl Wilson, then 18 years of age, who lived south of the crossing, went up Seventh street, past the crossing, about 100 yards, to a boot-black stand, where he had his shoes shined, intending to go to a party. He then returned along Seventh street until he reached the gate at the crossing, where he found a freight train passing and the gates down. There are three tracks at this point. The freight train was passing on the east track. As soon as the freight passed the gates were raised, and

Digitized by Google

he started across, passing close to the rear end of the freight which was going south. Just as he reached the next track he was struck by a north-bound passenger train on that track moving rapidly. He was not aware of the coming of the passenger train, and apparently did not know what had struck him. His arm was so broken by the collision as to require amputation near the shoulder, and he sustained a serious injury to his head as well as bruises on his body. He brought this suit to recover damages. The case was tried in the circuit court, resulting in a verdict and judgment for him for $2,250, and the railroad company appeals.

The above is a statement of the facts as shown by the proof for the plaintiff; three or four persons in the vicinity testifying that the accident occurred as related above. On the other hand, the proof for the railroad company is that the gates were not raised, that there was no freight train going south on the east track, and that Wilson swung off of a freight train passing along the west track and was struck by the passenger train on the other track just after he reached the ground.

The court, among other things, instructed the jury as follows:

"(1) The court instructs the jury that it was the duty of the defendant, Louisville & Nashville Railroad Company, at the intersection of its tracks with Seventh and Magnolia streets to lower the gates which it maintained at said intersection on the approach of a train, so as to give to those attempting to use the crossing a reasonable opportunity to avoid injury from the train, and, if the jury believe from the evidence that at the time and place complained of by the plaintiff, Carl Wilson, the defendant negligently failed to discharge this duty, and that the plaintiff

Digitized by Google

was injured thereby while attempting to cross said intersection, and that the plaintiff was not at said time and place himself guilty of contributory negligence, but for which he would not have been injured, then the law is for the plaintiff, and the jury shall so find."

"(2) If the jury believe from the evidence that the defendant discharged the duty incumbent upon it as laid down in instruction 1, or if they believe from the evidence that the plaintiff was not injured while attempting to cross over the intersection, or if they believe from the evidence that the plaintiff was himself guilty of contributory negligence, but for which he would not have been injured, then the law is for the defendant, and the jury shall so find."

"(4) By the term 'contributory negligence,' as used in these instructions, is meant a failure on the part of the plaintiff to use ordinary care for his own protection and safety, under the facts and circumstances in evidence preceding and attending his injury; and in this connection the court instructs the jury that, if they believe from the evidence that the gates were raised or were up at the time the plaintiff entered upon the intersection for the purpose of crossing it, then this circumstance was an invitation on the part of the defendant to the plantiff and the public to cross, and an assurance that the track could be crossed in safety, and the plaintiff cannot be found guilty of contributory negligence in attempting to make the said crossing unless the jury believe from the evidence the he failed to use ordinary care for his own safety and protection under these circumstances; but, if the jury believe that the gates were raised or were up at the said time and the plaintiff did fail under the circumstances to use ordinary care, or if the jury believe that the plaintiff entered upon said crossing while the gates were down or were being lowered, then the law

Digitized by Google

is for the defendant and the jury should so find, notwithstanding the jury may believe that the defendant was also guilty of negligence at the same time and place.

"(5) If you believe from the evidence that the plaintiff, Carl Wilson, jumped upon or boarded the freight train of the defendant without the defendant's consent, and while alighting from such train the plaintiff, Carl Wilson, was injured, then the law is for the defendant, and you shall so find."

As the proof was clear that Wilson, if he jumped upon or boarded the freight train, did so without the defendant's consent, the fifth instruction was in effect a peremptory instruction to the jury to find for the defendant if he received his injuries while alighting from that train. The same idea is conveyed in so much of instruction 2 as told the jury they should find for the defendant if the plaintiff was not injured while attempting to cross over the intersection; so that the verdict of the jury is a finding that he was injured while crossing over the intersection in the manner related by him.

The finding for the plaintiff under instructions 1 and 2 is in substance a finding that the gates at the crossing had been raised as an invitation to persons on the street to pass over the intersection, and that he was injured while attempting to do so and exercising ordinary care for his own safety under the circumstances. It is complained that the court told the jury in effect that Wilson had a right to rely upon the raising of the gates as an invitation on the part of the defendant to cross. Wilson testified that, when the gates were raised, he did not stop, look, or listen for the train, but, assuming that it was safe, went upon the crossing, and it is insisted that the court in lieu of instruction No. 1 should have given the jury this in-

Digitized by Google

struction: "It was the duty of defendant to exercise care to notify persons using said street of the approach of a train or trains to said crossing by lowering the railroad gates, or by other notice or signal reasonably calculated to warn persons using said street or avenue of the approach of a train or trains to said intersection. The plaintiff, Carl Wilson, had the right to cross the railroad tracks on Seventh street or Magnolia avenue, but it was his, the said Carl Wilson's duty to exercise care and prudence to discover for himself the approach of trains, and care and caution to keep out of danger." The passenger train was ringing its bell as it approached the crossing, but the freight train perhaps prevented Wilson from hearing the bell or seeing the passenger train, and so the question is presented whether the raising of the gates at the crossing of a city highway may be relied on by the traveler as an invitation to pass over the crossing.

In Dick v. L. & N. R. R. Co., 64 S. W. 725, 23 Ky. Law Rep. 1068, where the plaintiff had been injured on a street crossing similar to this when the gates were up, the circuit court had given a peremptory instruction to find for the defendant, but this was reversed on appeal. The court said: "The court cannot say as matter of law that because she failed to look and listen for the approaching train before she went on to the track she was guilty of contributory negligence, in view of the fact that appellee was required and did keep a watchman and gates across the street at that crossing, and that it was his duty to let down the gates on the approach of trains. If the gates were up, as appellant's proof tends to show, it might reasonably be concluded by the traveler that there was no danger in crossing. As to whether there was negligence in failing to look for a train when the

Digitized by Google

gates are up is a question that cannot be said as a matter of law to be entirely settled in the affirmative. Different persons, judging from the conduct of the ordinarily prudent person, might differ as to whether this was negligence. In our opinion the peremptory instruction was error." In Sights v. L. & N. R. R. Co., 117 Ky. 436, 25 Ky. Law Rep., 1548, 78 S. W. 172, the court quoted with approval the following: "And, when gates or a flagman have been maintained by railroad companies at the crossing of streets in cities and towns, the public have a right, when the gates are open, or the flagman not in his accustomed place of duty, to presume, in the absence of knowledge to the contrary, that the gateman or flagman is properly discharging his duties; and it is not negligence on their part to act on the presumption that they will not be exposed to a danger which could only arise from the disregard of his duties; and it is negligence for a gatekeeper or flagman to leave his post, knowing that an engine is approaching a crossing without giving some signal of danger." On the second appeal of that case (see L. & N. R. R. Co. v. Sights, 28 Ky. Law Rep. 186, 89 S. W. 132) the court approved an instruction substantially in the language above quoted. In this case the gatekeeper was not absent. He was at his post, and raised the gate. The obvious purpose in raising the gate was to take the gate out of the way of the people so that they could pass over. The raising of the gate was necessarily an invitation to the public to use the crossing, and, as has been well said, it can make no difference that a gatekeeper expresses that the road is safe by opening the gate or by word or gesture. The railroad company is required to maintain the gates for the better security of the public, and they would be not only a mockery, but actually misleading

Digitized by Google

if the raising of the gates when they are down is not an invitation for the public to pass. See Northern Central Railroad Co. v. State (Md.), 60 Atl. 19; Stegner v. Chicago, etc., R. R. Co. (Minn.), 102 N. W. 205, and cases cited.

The court did not tell the jury that the raising of the gates would relieve Wilson of the obligation to use ordinary care for his own safety. He only told them that the raising of the gates was an invitation on the part of the defendant to the plaintiff to cross, and he still left it for them to determine whether, in view of this invitation, Wilson exercised ordinary care for his own safety under the circumstances. The instructions of the court conform to the rule heretofore laid down by this court and fairly submitted the case to the jury.

Judgment affirmed.

Digitized by Google

CASE 107.—ACTION BY FANNY WILSON AGAINST THE LOUISVILLE & NASHVILLE RAILROAD CO. FOR DAMAGES FOR PERSONAL INJURIES.—March 6.

Louisville & N. R. R. Co. v. Wilson

Appeal from Barren Circuit Court.

SAMUEL E. JONES, Circuit Judge.

Judgment for plaintiff. Defendant appeals. Reversed.

1. Carriers—Personal Injuries—Persons Accompanying Passengers—Notice of Character.—Where a plaintiff accompanying two small children purchased a half-fare ticket and the agent asked if it was for a particular child, the other being evidently too young to pay fare, and she answered that it was, that she was sending the children to their mother, these facts, with the further fact that no ticket was bought for herself, were not sufficient to charge the ticket agent with notice that she was going aboard only to assist the children.
2. Same.—Where a train stopped its usual length of time at a station, during which plaintiff, with baggage in her hand and without explaining her purpose, got on the train to assist her grandchildren, who were with her and were to be passengers, there was no notice to the trainmen that she did not intend to remain on the train.
3. Same—Contributory Negligence.—Where plaintiff boarded a train to assist a passenger, her jumping off after the train started was contributory negligence precluding recovery for injury.

BENJAMIN D. WARFIELD and SIMS, DUBOSE & RODES for appellant.

J. LEWIS WILLIAMS for appellee.

(No briefs—record out of office.)

Digitized by Google

OPINION OF THE COURT BY JUDGE SETTLE—Reversing..

This is an appeal from a judgment of the lower court entered upon a verdict awarding appellee $300 damages for injuries sustained in alighting from appellant's passenger train. The recovery was had upon the ground that appellant's agents in charge of the train were guilty of negligence in starting it without notice to appellee, and without reasonable time or opportunity for her to get off the train before it got in motion. The answer contained a traverse and pleaded contributory negligence on the part of appellee; the latter plea was denied by reply. The accident occurred at Cave City, where appellee had gone with her two grandchildren to put them aboard appellant's train that they might be carried to their mother in Louisville. According to appellee's own testimony, when she got to the depot with her grandchildren, she bought of appellant's ticket agent, Curd, a half-fare ticket for one of them, but got no ticket for the other, as, under appellant's rules, it was entitled to free transportation. When the train arrived and stopped at Cave City, appellant took the children into the apartment of the coach reserved for colored passengers, where they belonged, but, finding the seats taken therein, she led the children into the smoker's section of the coach, and, upon reaching the first vacant seat, discovered that the train was in motion, whereupon she at once deposited their baggage, consisting of two baskets and a parcel, and leaving the children, hastened to the platform of the coach, from a step of which, though the train was still in motion, she jumped to the depot platform, thereby breaking the bones of one of her ankles.

Digitized by Google

It is not apparent from the evidence that the children were incapable of entering the coach and finding seats without assistance, for they had frequently traveled from Louisville to their grandmother's and back to Louisville, but the evidence did conduce to prove that they were unable to carry into the car the large quantity of baggage accompanying them. We may, therefore, assume that it was necessary for appellee, or some one, to assist them upon the train with it, and that she had the right to enter the coach for that purpose, but that fact was not, of itself, sufficient to make appellant responsible for her injuries. We find the law thus announced in Moore on Carriers, p. 584: "There is no obligation upon the carrier to hold its train until every person not a passenger leaves the same, irrespective of the time of the stop made at the station. It is the duty of one who has assisted a passenger on board, if the train starts before he has had time to get off, to remain until he can make known his wish to get off, and, if he alight while the train is in motion, he does so at his own risk, and cannot maintain an action against the carrier for injuries received, unless he shows that he exercised due care and the carrier was negligent. It is not negligence for the carrier to start its train before such person has had time to get off, unless its servants had notice of his intention to do so." Texas Pac. R. Co. v. McGilvany (Tex. Civ. App.), 29 S. W. 67; Dillingham v. Pierce (Tex. Civ. App.), 31 S. W. 203; McLarin v. Atlantic, etc., R., 85 Ga. 504, 11 S. E. 840; Central R. R. v. Letcher, 69 Ala., 106, 44 Am. Rep. 505; Yarnell v. Kansas City R. Co., 113 Mo. 570, 21 S .W. 1, 18 L. R. A. 599; Coleman v. Georgia R. & B. Co., 10 S. E. 498; Keokuk Packet Co. v. Henry, 50 Ill., 264. In Little Rock & Fort Smith R. Co. v. Lawton (Ark.), 18 S. W. 543, 15 L. R. A. 434, 29 Am.

Digitized by Google

St. Rep., 48, the facts were very similar to those of the case at bar. Lawton had taken the hand baggage of a lady and child into the car, and in alighting after the train started was injured. His main contention was that the train did not stop a reasonable length of time to permit him to alight. The trial court instructed the jury that it was the duty of those in charge of the train to hold it the full length of time that was usually required for passengers to get on or off the cars at that place. In passing on this contention the Supreme court of Arkansas in part said: "But one who goes upon the train to render necessary assitance to a passenger in conformity to a practice approved, or acquiesced in, by the carrier, in its interest and upon its implied invitation as before stated, has a right to render the needful assistance and leave the car, and the railroad company, in permitting him to enter it with knowledge of his purpose, is presumed to agree that he may execute it, and is bound to hold the train a reasonable time therefor. Griswold v. Chicago & N. W. R. Co., 64 Wis. 652, 26 N. W. 101. But the duty is dependent upon the knowledge of his purpose by those in charge of the train, for without such knowledge they may reasonably conclude that he entered to become a passenger, and cause the train to be moved after allowing him a reasonable time to get aboard. The law could not, in reason or justice, impose as a duty the doing of that which, in the light of everything known to trainmen, would not appear necessary or proper, or hold that the cars should be stopped when there was no reason to stop them except a fact unknown to them. * * *" The doctrine announced in the cases supra was approved by this court in Berry v. L. & N. R. R. Co., 60 S. W. 699, 22 Ky. Law Rep. 1410. Berry, having gone into a passenger car to bid his family goodbye on their departure for

Digitized by Google

Florida, attempted to alight from the train while it was in motion and was thrown under it and injured, for which he sought to recover damages of the railroad company. This court, after reviewing the authorities, supra, and others cited in the case, in part said: "From these and numerous decisions bearing upon this question, we think it is clear that, if appellee had either actual or constructive notice that appellant had gone into the car for the purpose of seating his wife and children, and that he intended to get off before the train started, it was their duty to have given him notice before starting the train, and to have held it long enough for him to get off with safety, but, in the absence of such notice, no obligation existed upon their part. * * *" In the more recent case of Bishop v. I. C. R. R. Co., 77 S. W. 1099, 25 Ky. Law Rep. 1363, the court, following L. & N. R. R. Co. v. Crunk, 119 Ind. 549, 21 N. E. 31, 12 Am. St. Rep. 443, held that the question of the railroad company's liability should have been left to the jury, as the evidence conduced to prove that Bishop had entered the car to asisst an invalid woman by direction of the conductor of the train, who, under such circumstances, should have held the train a reasonable time for him to get off, or in any event have given him notice when it was about to start.

It is appellee's contention that appellant did have notice of her entering the car and the purpose for which she did so, and that, with such knowledge, its servants in charge of the train started it without notice to her, and also without stopping it the customary or reasonable time. The alleged notice of her purpose in entering the car, she claimed, was given to Curd, the ticket agent, when she bought the half ticket for the older of the two children. She testified that the children were then with her, and were known

Digitized by Google

to, and seen by, Curd, who asked her if she wanted the ticket for the boy, and that she answered in the affirmative and told him she was going to send them to their mother in Louisville, and these facts, with the further fact that she did not get a ticket for her own use, it is insisted, was notice to him, and through him to the appellant, that the children would have to be assisted on the train and that she was not going to Louisville with them. It was not stated by appellee, or claimed by her counsel, that she told the ticket agent she was not going to Louisville with the children, and the purchase of a ticket by her was not a condition precedent to her right to enter the train as a passenger for Louisville, but, assuming that her failure to get for herself a ticket gave, or ought to have given, the agent information that she would not accompany her grandchildren to Louisville, it was not notice to him that they would not be placed by her in charge of some one then in Cave City, or whom she expected to be on the train when it arrived. Nor do these alleged facts create the presumption that the ticket agent knew, or ought to have known, that it would be necessary for the children to be assisted into the car. As it was not claimed by appellee that the ticket agent saw or was told what quantity of baggage they had. what reason had he for knowing that they were encumbered with baggage which they could not carry into the car? In view of the manifold duties required of a ticket agent, and in the absence of a direct request from appellee that he inform the conductor that she would have to be allowed to assist her grandchildren on the train and given time to do so, it cannot fairly be claimed that he was charged with such duty, or knew that it was expected of him.

The evidence failed to show that the conductor or brakeman were neglectful of their duties. The former,

Digitized by Google

after seeing the passengers who were to get off at Cave City leave the train, went to the front end of the train to assist in removing a corpse from the baggage car. One of the brakeman assisted, as was customary and proper, in securing water from the tank for the locomotive, the other was in his place on the station platform, somewhere between the smoker and ladies' coach, assisting passengers entering or leaving the cars. Evidently this brakeman was the one seen by appellee when she boarded the train with her grandchildren. Both the conductor and brakeman denied that they saw appellee get on the train, or knew she was on it or that they had notice of her purpose to leave the car. From their testimony, as well as that of practically nearly all the witnesses, it appears that, on the occasion in question, the train remained at Cave City the usual stopping time, which was about four minutes, and that, just before the train started, the conductor called out the usual warning, "All aboard." Manifestly, the stop was long enough to let the usual number of passengers on and off the train, allow time for taking the corpse from the baggage car, and to supply the locomotive with water. There could not, therefore, have been any undue haste in starting the train. According to the evidence appellee knew that it was customary for this train to stop at Cave City from two to four minutes, and that, when it took water there, which it rarely missed doing, the full time allowed for the stop was usually consumed. With this knowledge, she ought to have timed her going upon, and getting off, the train accordingly, or, of she had reason to believe that the train would not stop long enough to enable her to assist the children into a car, find them a seat, and deposit their baggage, she should have notified the conductor or a brakeman of the purpose

Digitized by Google

for which she was about to enter the car, or have requested him or them to take the baggage into the car and assist the children to a seat therein. She admitted that neither of these things was done by her, although there was, as she testified, a brakeman of the train standing near when she got on the coach. This being true, it is but reasonable to presume that the brakeman supposed she was entering the coach as a passenger, and, as she was carrying the baggage for the children and had them in charge, there was nothing in the appearance or situation of the parties that required additional assistance from him, or that gave him information that appellee was not entering the car as a passenger. In brief, the facts supplied by the evidence were not sufficient to constitute actual or constructive notice to the ticket agent or trainmen that appellee was not a passenger, or that it was her purpose to leave the car after assisting the children to a seat and depositing their baggage. Therefore, no negligence on the part of appellant's ticket agent or trainmen was shown by the evidence, and, appellee's injuries having resulted solely from her own negligence, the jury should have been peremptorily instructed to find for appellant.

It is not claimed that appellant's servants in charge of the train knew, or by the exercise of ordinary care could have known, of appellee's purpose to jump therefrom, in time to stop the train, and thereby prevent her injuries.

It follows from what has been said that the instructions given by the court were altogether erroneous.

Judgment reversed, and cause remanded for a new trial and further proceedings consistent with the opinion.

Judge Nunn dissents.

Digitized by Google

Digitized by Google

INDEX

ACTIONS—See Limitation 1, 2, 3.

ADVANCEMENTS—See Descent and Distribution 1, 2, 3.—

1. Parol Gift of Land—Subsequent Conveyance—Rents—Where a father settled three of his daughters on land promising to make them deeds, and telling them they could improve it and pay the taxes, and that they would not have to account for rents and that it should be their land, to which he subsequently made each of them deeds, the land should be treated as an advancement as of the date when the deeds were made, and the gift perfected, but his delay in making the deeds did not make them liable for rents. Ward, &c. v. Johnson, &c. 1
2. Decedents' Estates—Distribution—Value of Advancements—How Determined—In the distribution of a parent's estate each child must account for any advancement made by its parent at its real value. The value of the property at the time the gift was made may be considered by the court, in connection with other proof in determining its real value, but it is not conclusive, and where land is given, the enhancement of the value of each tract, by reason of permanent improvements put upon it by the donee should be excluded. Idem 1
3. Parent and Child—Contract—Interest in Parents' Estate—Sale — Validity—Advancement — An agreement in writing between a father and son which recites: "in order to settle a suit between them and avoid litigation, and in consideration that my father has this day given me in cash $1,000 which I accept in full of all my present or future interest in his estate," is not an enforceable contract; but in the settlement of the father's estate the sum of $1000 should be charged to the son as an advancement, whether it was so intended by the father or not. Elliott, &c. v. Leslie.....553

APPEALS—Cee Criminal Law 1, 4—Judicial Sales 4, 5-11, Life Insurance 10.—

1. Appeal Bond—Affirmance on Appeal—Release of Sureties—Bankruptcy of Principal—The sureties on an appeal bond

Digitized by Google

APPEALS—Continued—

executed to stay proceeding on a judgment in the circuit court until it can be heard and determined in the appellate court, can not be released from liability on the bond on the ground that the principal in the bond has been discharged as a bankrupt after the judgment of the lower court was affirmed in the appellate court. Slusher, &c. v. Hopkins, &c. 44

2. Reservation of Grounds for Review—Motion for New Trial.—Instructions not relied on as a ground for new trial will not be considered on appeal. Merchants Nat. Bank v. Ford 403

3. Same—Objections to Pleadings—Name of Defendant—Where a cross-petition was filed against "J. C. and——C., partners, doing business under the firm name of J. C. & Son," and they entered appearance and answered without exception, complaint cannot be made on appeal because the son's name was not given in the pleadings. Idem..... 403

4. Supersedeas—Damages on Appeal—An order for the payment of money to the receiver is a judgment for the payment of money, and, if superseded, on appeal, the ten per cent. damages allowed by section 764 of the Civil Code may be recovered thereon by appellee, if affirmed. Robinson Norton & Co. v. Cotton Factory, &c..... 435

5. Costs—Appeal—Damages—Affirmance of Judgment—In an action to enjoin the collection of taxes, plaintiff appealed from the judgment decreeing that the taxes were an enforceable lien, and gave a bond conditioned to pay defendant such damages as it might sustain if it should be finally decided that the injunction ought not to have been granted, as provided by Civil Code Prac., 1889, sec. 747, giving the trial court discretion to make an order pending the appeal upon such terms as to bond as may be proper. Held that, though the bond was in effect a supersedeas bond, the case did not fall within section 764, Civil Code Prac., 1902, providing that upon affirmance of an appeal 10 per cent. damages on the amount superseded shall be awarded, since that section only applies to judgments for the payment of money. Bell's Trustee v. City of Lexington..... 463

6. Delay—Dismissal—Plea in Bar—Where an appeal not taken within the statutory time is sought to be dismissed on that ground, the statute must be pleaded. Spradlen, &c. v. Stanley's Admr., &c..... 701

7. Same—Objection in Court Below—Necessity—A person sui

Digitized by Google

APPEALS—Continued.

juris who stands by and permits a commissioner's report allowing claims against the estate of decedent which are not properly verified to be confirmed, and a judgment to be entered, cannot for the first time on appeal object that the claims were not properly verified. Idem..... 701

8. Infants—Actions Against Infants—Effect of Error—Reversal—As an infant cannot waive his rights by failure to object during the trial, an erroneous judgment against an infant must be reversed on appeal where his condition appears in the record; and, where his condition does not appear, the error may, under the express provisions of Civil Code Prac., section 518, be corrected by the court rendering the judgment. Idem 701

ASSIGNMENTS—

1. Assignments for Benefit of Creditors—Sale by Assignee—Order of Court—Jurisdiction—Under Ky. Stats., 1903, sec. 75, providing that an assignor for creditors shall file his schedule for record in the county where the assignee qualifies, and the deed of assignment shall be recorded in the county clerk's office of the county where the assignor resides, and where the business in respect of the same is carried on, and in each county where a tract of land or a part thereof conveyed by the deed is situated, and section 87, providing that property shall be sold by the assignee as "the court" shall direct, and any exceptions to a confirmation of the report of sale shall be heard by "the court," the county court of the county where the assignee qualifies, and not where the business is carried on, has jurisdiction to order a sale of the assigned estate. Lexington & C. C. Mining Co. &c. v. Columbia F. & T. Co. 119

2. Bankrupts—Salary of City Official—Fradulent Assignment—Delaying Creditors—Under the bankrupt law an assignment by a city official of his salary within four months prior to filing his petition in bankruptcy with intent to hinder or delay his creditors is fraudulent, and in order to protect purchasers three things must occur: (1) Their own good faith, (2) a consideration passing at the time, and (3) it must be a fair equivalent of the thing purchased. O'Sullivan's Trustee v. Douglass..... 243

3. Same—An assignment of his salary by a city official to one who did not pay or agree to pay a consideration therefor, made within four months prior to such assignor's filing his

Digitized by Google

ASSIGNMENTS—Continued—

petition in bankruptcy, is void as to the creditors of the assignor, and such salary remains the assets of the bankrupt and passes to his trustee unless exempt to the bankrupt under the laws of this State. Idem..... 244

4. Attachment of Salary—The salary of a city official may be attached for his debts. Idem..... 244
5. Prior Adjudication—Absence of Collusion—Conclusiveness of Judgment—Where the liability of a debtor's salary to the payment of his debts has been adjudicated in a court of competent jurisdiction which was not collusive, the subsequent bankruptcy of the debtor and appointment of his trustee cannot open that question for litigation in the absence of an allegation of collusion in the parties obtaining the judgment. Idem 244

ATTACHMENTS—

1. A verdict as to the amount due for goods purchased, based on conflicting evidence, will not be disturbed on appeal. Lexington Brewing Co. v. Goode & Co..... 476
2. Quashing Grounds—In an action to recover for beer sold, a firm of saloon keepers, defendants, were proved to be insolvent, and neither the firm nor the individual members had any property subject to execution, except their stock of liquors and saloon fixtures, which were attached on the ground that defendants had not enough property to satisfy the demand and the collection of it would be endangered by delay in obtaining judgment and a return of "No property found." At the sale by the sheriff the stock and fixtures brought $327, and plaintiff recovered a verdict of $476. Held, that it was error to discharge the attachment. Idem.....476
3. Same—Evidence—In proceedings to discharge an attachment on a saloon stock and fixtures on the ground that they were insufficient to pay the debts of defendants, evidence as to what the stock would bring at retail is inadmissible, the issue being as to the value at a sale made at once, and evidence as to the value of licenses was inadmissible, as they were not subject to execution. Idem..... 477

ATTORNEYS—Se Judicial Sales 10, 11.

Attorney and Client—Compensation—Lien—Where an attorney was employed on commisson to enforce a judgment, but his name did not appear on the records, and the judgment was assigned, without notice to the assignee of his employ-

Digitized by Google

ATTORNEYS—Continued—

ment, he was nevertheless entitled to a lien on the amount recovered, it not having been paid over, for his agreed commission, notwithstanding Ky. Stat. 1903, sec. 107, relating to the enforcement of attorneys' liens, and providing that, if the record shows the name of the attorney, the defendant shall have notice of the lien; this provision being for the benefit of the defendant alone. Tyler v. Slemp, &c.....208

AUTOMOBILES—See Personal Injuries 1, 2, 3.

BANKRUPTS—See Appeals 1—Assignments 2, 3, 5.

BANKS AND BANKING—

1. Special Deposit—Appropriation to other debts of Depositor—The rule that where one indebted to a bank has money on deposit in the bank at the date upon which a note owing to the bank by a depositor falls due, it is the duty of the bank to apply the money on deposit to the discharge of the note, and if it fails to do so it releases the sureties an the note to the extent of such deposit, applies only to general deposits and not to a special deposit. Planters State Bank v. Schlamp, &c. 295
2. Same—Discounting Note—Money left in Bank—Promise to Pay on Checks—Improper Appropriation—Schlamp discounted a note for $1,000, executed by him and two sureties at a bank in which he was not a depositor, but at the suggestion of the cashier that it was not convenient to pay him the money on that day but promised to pay it on checks when presented, and on further request for the money said he would prefer to pay on checks, and thereby delayed payment until a partnership note for $1,500, held by the bank on Schlamp and another fell due, when it notified Schlamp that it had appropriated $750 of the $1,000 note to the liquidation of his half of the $1,500 partnership indebtedness to the bank. In an action by the bank on the $1,000 note, payment was resisted by Schlamp and his sureties, to the extent of the $750. Held, That the bank had no right to appropriate the $750 or any part of the $1,000 note to the discharge of any part of the $1,500 debt owing to the bank by Schlamp, but was bound to honor his check for the $1,000 special deposit as it had agreed to do. Idem..... 295
3. National Banks—Right to Regulate—Ky. Stats., 1903, sec. 483, placing notes payable and negotiable at banks organized in the State under the State and federal laws, and indorsed to,

Digitized by Google

BANKS AND BANKING—Continued—
or discounted by, any such bank on the same footing as foreign bills of exchange, violates no rights secured to national banks by acts of Congress, such banks being subject to the control of the state in which they are situated, as regards the construction of contracts, the transfer of property, or creation of debts and liability to suit. Merchants Nat. Bank v. Ford..... 404

4. Executors and Administrators—Leath—To Whom Assets Pass—Money deposited in a bank to the credit of decedent as executor passed to the administrator de bonis non of the estate of which decedent was executor, and not to the executor's administrator. Clark's Admr. v. Farmers Bank, &c. 563

5. Recovery of Deposits—No cause of action arises for the recovery of a demand bank deposit until demand for and refusal of payment has been made. Idem..... 563

6. Same—Interest—In the absence of a special contract, a demand bank deposit does not bear interest. Idem.....563

7. Stockholders—Transferring Stock—Good Faith—Entry on Books—Liability—A shareholder in a corporation, although a director, who in good faith, free from any suspicion of fraud, or to escape liability, sells his stock and requests the officers in active charge of the corporation, who have control of its books in making the transfer, to do everything that is necessary to perfect such transfer in a legal way, and is informed by them that there is nothing more to be done, will be relieved from future liability as a shareholder, although no book was kept by the corporation in its principal office, in which all transfers of stock shall be entered, stating when, the number of shares transferred, and by and to whom, as required by Kentucky Statutes, section 546. Bracken v. Nicol..... 628

BILLS AND NOTES—See Banks and Banking.

BOND FOR COSTS—See Non-residents.

BRIDGES—See Turnpikes.

1. Erection—Where a town is authorized to build a bridge across a stream it is its duty to build a more permanent and substantial structure than a pontoon bridge. Clay City v. Roberts, &c..... 594

2. Same—Refusal to Build Bridge—Lack of Funds—The refusal

Digitized by Google

BRIDGES—Continued—

of a town, because of a lack of available funds, to rebuild a bridge which has been washed away, will be sustained though a portion of the inhabitants are greatly inconvenienced thereby. Idem 594

3. Mamdamus—Discretion of Council—Formality of Determination—The council being the legislative branch of a town government as long as it acts within statutory authority in the management of the town affairs, its acts are not subject to judicial control, and the action of a town council in refusing to rebuild a bridge which had been washed away was not subject to review by mandamus. Idem..... 594

BROKERS AND FACTORS—

1. Merchant Brokers — Authority—Purchasing From — Risk Assumed—A merchandise broker is one who negotiates the sale of merchandise without having it in his possession. He is an agent with very limited powers and ordinarily has no authority to receive payment for property sold by him for his principal; and a purchaser who pays the broker does so at his own risk and is not discharged from liability to the principal unless the authority of the broker to receive payment be express or may reasonably be implied from the circumstances. Robinson, Norton & Co. v. Cotton Factory, &c. 435
2. Factors—Possession of Goods—Evidence of Ownership—A factor or commission merchant is one who has the actual or technical possession of the goods or wares of another. The possession of the property is prima facie evidence of ownership, and being thus in possession for the purpose of sale a factor may sell it in his own name and collect the proceeds without disclosing the name of the principal. Idem..... 435
3. Insolvent Broker—Selling Goods for Another—Knowledge of Purchaser—Rights of Owner—Where a firm puchased goods from an insolvent broker and paid him for them with knowledge that they were not in his possession, and that he was selling them for another, such purchaser assumed the risk and is not entitled to recover the goods from the real owner. Idem 435

BURDEN OF PROOF—See Husband and Wife 2.

CHAMPERTY—See Lands 3.

Digitized by Google

CHANGE OF VENUE—See Criminal Law 32, 33, 34, 35.

CITIZEN—See Corporations 1, 2, 3.

CITY COUNCIL—See Bridges 3.

CONSIDERATION—See Assignments 3.

CONTRACTS—

Indemnity—Construction of Contract—Liability For Accidents—Plaintiff contracted to do certain work in the contruction of a tunnel for defendant, agreeing to save defendant harmless from "all casualties or accidents resulting to employes engaged in the work contemplated under this contract, or to any third person who may be in any manner injured or damaged" by him or his servants. By the specifications, which were made a part of the contract, plaintiff was made responsible for all damages "to the work * * * persons and property, which could have been avoided by the exercise of proper care and viligance on his part." Held that, in view of the clause in the specification, the contract made plaintiff liable only for casualties and accidents produced by his own negligence or that of his servants, and not for accidents that were caused by defendant's negligence. Mitchell v. Southern Ry. Co. 146

2. Appeal—Review—Damages—Excessive—Breach of Contract—Under the rule that a verdict awarding damages will not be disturbed, as being excessive, unless it is palpably against the evidence, so as to strike the mind at first blush as being the result of passion or prejudice, a verdict for $1,600 damages for breach of a warranty that all colts of a stallion, sold for $1,800, would be black, brown, or bay in color; that he was free from all defects and that he would produce colts from 75 per cent. of all mares bred to him; and for the breach of an agreement not to sell any stallion of the same breed within 20 miles of the buyer's residence—was not excessive. Merchants Nat. Bank v. Ford..... 403

3. Specific Performance—Damages—Where a contract for the sale of a lot required the vendee to construct a building within 18 months and erect a party wall on the east side, adjoining the vendor's remaining vacant property, and in a suit to enforce performance of such stipulation plaintiff neither alleged nor proved that he had lost the sale of his adjoining lot through defendant's failure to erect the wall, nor that

Digitized by Google

CONTRACTS—Continued—
plaintiff intended himself to erect a building on the lot, he was not entitled to recover damages for defendant's failure to erect the wall within the time prescribed. Hagins, &c. v. Sewell 588

4. Same—Where a deed to a vacant lot contained a covenant obligating the vendee to erect a building on the land conveyed, together with a party wall adjoining the vendor's remaining premises, and the vendee failed to erect the wall within the time prescribed, the vendor, suing for specific performance, was entitled to a judgment for the cost of the wall in case the vendee should fail to perform within the time allowed by the court. Idem..... 588

5. Same—Judgment—Operation and Effect—Where. in a suit to compel performance of a covenant to construct a building and a party wall on a lot conveyed, complainant recovered a judgment for the cost of the wall in case defendant should fail to erect it within the time limited by court, complainant, if he collected the judgment and failed to erect the wall and the same should afterwards be erected by defendant, would not be entitled to use the wall without paying for the privilege, while if complainant erected the wall after collecting the judgment, defendant or his vendee would be permitted to use it without making further contribution. Idem..... 588

CONTRIBUTORY NEGLIGENCE—See Personal Injury, 8, 9—Pleading 3, 4—Railroads 7, 8, 9, 10—Street Railroads, 2, 3.

CONTRACT—See Criminal Law 16, 17.

CORPORATIONS—

1. Constitutional Law—Privileges and Immunities—Corporations—A corporation is not a "citizen" within the meaning of Const. U. S., art. 4, sec. 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states, nor within the meaning of 14th Amend., sec. 1, providing that no state shall abridge the privileges and immunities of citizens of the United States. Merchants Nat. Bank v. Ford..... 403

2. Same—Equal Protection of the Laws—Corporations—A foreign corporation not subject to process issuing from the courts of the State is not within its jurisdiction within the meaning of Const. U. S., 14th Amend. sec. 1, providing that no state shall deny any person within its jurisdiction the equal protection of its laws. Idem 404

Digitized by Google

CORPORATIONS—Continued—

3. Same—A nonresident corporation cannot demand rights which are accorded not to the citizens of the State, but only to resident incorporated banks. Idem..... 404

COSTS—See Appeals 5.

COUNTIES—

Action by Tax Payer—Taxes Illegally Collected—Remedy—Counties are subordinate subdivisions of the State and are not liable to suit unless authority can be found for it in the statute or it follows by necessary implication from some express power given. Where taxes have been wrongfully collected by county officials and are in hands of the collecting or disbursing officers, a direct action may be brought by the tax payer against the person holding the tax, but after the taxes collected have been paid out the tax payer is without remedy as against the county. Comth. for &c. v. Baske, &c. 468

COUNTY COURTS—See Assignments 1.

CRIMINAL LAW—

1. Appeal—Evidence—Where there is some evidence on which to base a conviction, it cannot be set aside on appeal as unauthorized or flagrantly against the evidence. Stevens v. Comth. 32
2. Homicide—Evidence—Reputation of Deceased—In a prosecution of a peace officer for killing deceased while attempting to restrain him from escaping, evidence concerning decedent's reputation among peace officers in the county, as distinguished from his acquaintances generally, was inadmissible. Idem 32
3. Conduct of Trial—Persons Present—Unanticipated Outbreak—In a prosecution for homicide, it was not error for the court to permit decedent's widow to sit in the courtroom during the taking of testimony, and, while weeping, to make an unanticipated outbreak denouncing defendant, she having been quickly required thereafter to withdraw from the courtroom. Idem 32
4. Same—Objections—Exceptions—Necessity—In a prosecution for homicide, the failure of the court to put an earlier end to a sudden outbreak and manifestation of grief on the part of decedent's widow, before the jury, could not be reviewed

Digitized by Google

CRIMINAL LAW—Continued—

on appeal, in the absence of an objection and exception taken thereto at the time. Idem..... 32

5. Same—Argument of Counsel—Misconduct of the commonwealth's attorney in his closing arguments to the jury cannot be reviewed on appeal, where it was first presented to the trial court in defendant's motion and grounds for a new trial without any objection taken thereto at the time or request that the court admonish the jury not to consider it, and an exception reserved. Idem..... 32

6. Arrest—Necessity of Warrant—Peace Officer—Authority—Where decedent was both drunk and disorderly in the presence of a peace officer, the officer was authorized to arrest him without a warrant, and hold him until a police justice could be sent for and either try him or commit him in default of bail. Idem..... 33

7. Homicide—Preventing Escape of Prisoner—Where, after defendant had legally arrested decedent for misdemeanor, decedent attempted to release himself from arrest by forcibly overpowering defendant, the latter was entitled to use such force as was reasonably necessary to overcome that used by decedent, even to the extent of shooting and killing him if it reasonably appeared to defendant that that was the only way of preventing his escaping from defendant's custody, though defendant would have had no right to shoot deceased if he had got away from him and was fleeing to escape. Idem..... 33

8. Same—Instructions—In a prosecution of a peace officer for killing decedent after his arrest for misdemeanor, the court charged that, if decedent refused to submit to the arrest or to remain in the officer's custody, the latter was entitled to use reasonable force to compel him to submit, and if decedent self and use force reasonably necessary to repel the assault self and use force reasonably necessary to rpel the assault and protect himself from great bodily harm or death at the hands of decedent or overcome the latter's force to resist arrest or continued control after arrest, but that defendant had no right to kill decedent nor to retain custody of his person except as decedent was assaulting defendant, etc. Held, that such instruction was erroneous, as limiting the officer's right to kill to the single ground of self-defense. Idem..... 33

9. Instructions—Sufficiency—Where the court, on a trial for homicide, correctly charged on the law of self-defense, an

Digitized by Google

CRIMINAL LAW—Continued—

instruction that to kill with a deadly weapon in sudden affray or sudden passion without malice "and not in * * * necessary self-defense was voluntary manslaughter, was not erroneous for failing to state the law of self-defense. Austin v. Comth. 55

10. Same—Argument of Counsel—A statement of the prosecuting attorney in his argument to the jury on a trial for homicide while warning them of their duty, that the crack of the pistol, the roar of the shotgun and the flash of the dirk had made the state notorious for crime, was not reversible. Idem 55

11. Same—On a trial for homicide the prosecuting attorney, in his closing argument, stated that accused was under the duty to flee before striking. On objection he withdrew the statement, and said that he meant to say that accused must avoid striking if he could in safety to himself as the situation then reasonably appeared to him. Held that the statement was not prejudicial to accused. Idem..... 55

12. Same—Evidence at Former Trial—Method of Proof—Statutes—Ky. Stats., 1903, secs. 4637-4645, authorizing the appointment of an official stenographic reporter who shall take stenographic notes of the testimony, and make a transcript of the same to be used in making a bill of exceptions, and providing that, in a criminal case, the testimony, taken by the reporter, shall be used on a subsequent trial only on the consent of accused, do not change the method of proving the testimony of a deceased witness by bystanders who heard and remembered the testimony of the deceased witness, and do not make the reporter's notes the best evidence. Idem 55

13. Same—The transcript of the testimony of a deceased witness, testifying at a former trial, may be proved by the official stenographic reporter and read by him as evidence when the reporter testifies that the testimony was taken down accurately and correctly transcribed. Idem..... 56

14. Witnesses — Cross-Examination — Testing Memory and Veracity—In a criminal case the stenographer who took down the testimony of the witnesses at a former trial and who testified as to the testimony given at that trial by a deceased witness was properly cross-examined by being required to read his transcript of the evidence as a means af testing his memory and veracity. Idem..... 56

15. Evidence—Hearsay—Affidavit for Continuance—An affidavit for a continuance of a prosecution for murder of a fellow

Digitized by Google

CRIMINAL LAW—Continued—
convict, on the ground of absence of a witness, alleged that, if such witness were present, he would testify that he was guard in charge; that deceased had been reported to him for threatening, and declaring his purpose to assault, defendant; that defendant had so reported, and that witness had forbidden deceased from threatening to assault defendant, etc. Held, that such affidavit was properly excluded from evidence, the statements which it alleged that the witnessse would make being merely hearsay. Huffaker v. Commonwealth. 114

16. Same—Offenses by Convict—Punishment—The fact that one convicted of murder is serving a sentence of life imprisonment does not prevent his being tried and sentenced to be hung for the murder of a fellow convict. Idem..... 114

17. Same—The fact that appellant was serving a sentence in the Branch Penitentiary at Eddyville, for an offense committed in Pulaski county, did not deprive the Lyon Circuit Court, the county in which Eddyville is situated, of jurisdiction to try him for the killing of a fellow convict. Idem.....114

18 Homicide—Principals—Accessories Before the Fact—Under the statutes of the State which do not create or describe the crime of murder, or mention aiders and abettors or principals in the first or second degree, but merely fix the punishment for murder, and do not define the penalty for an accessory before the fact, but provide by Ky. Stats., 1903, section 1128, that, in all felonies, accessories before the fact shall be liable for the same punishment as principals, and may be prosecuted jointly with principals, or severally, though the principal be not taken or tried, the principal actor, the aider and abettor, and the accessory before the fact are all principals in the first degree, and may be accused and convicted as such. Commonwealth v. Hargis..... 356

19 Same—Indictment—Charging One with Being an Accessory—Under Crim Code of Prac., section 122, declaring that an indictment shall contain a statement of the acts constituting the offense in ordinary language in such manner as to enable a person of common understanding to know what is intended, and section 126, providing that an indictment must charge but one offense, but, if it may have been committed in different modes and by different means, the indictment may allege the modes and means in the alternative, where the indictment charges that H. and others, in connection with J. and B., unlawfully, wifllully, and with malice aforethought shot and killed C., and that prior to such time such persons entered into a conspiracy to kill and murder C., and pursuant thereto J. and B., with the knowledge and consent, and by

Digitized by Google

CRIMINAL LAW—Continued—
the direction and procurement of H. and said others, did unlawfully, willfully, and with malice aforethought shoot and kill C., and that, before the time of said murder, said H. and others did unlawfully, willfully, and with malice aforethought advise, incite, procure, and persuade said J. and B. to so shoot and kill C., and at the time of said shooting said H. and others were present conveniently near, and did unlawfully, willfully, and with malice aforethought, aid, abet, counsel, advise, incite, and encourage said J. and B. to do said shooting and killing, H. may be convicted of murder on evidence either that he was an actual perpetrator of the act, or that he was present aiding and abetting, or that he was an accessory before the fact. Idem..... 356

20. Declarations of Conspirator—Proof of Connection with Conspiracy—On the trial of H. for murder of C., committed pursuant to a conspiracy, evidence by the State that S. was seen at the time of the killing in company with the persons who killed C., and who were in the conspiracy, in connection with the testimony of W. that shortly prior to the visit of S. to him, in regard to killing C., H. who had spoken to him about killing C. had told him to stay at his home till H. sent for him, sufficiently connects S. with the conspiracy to make competent against H. the declaration of S. then made to W., that H. had sent to W. the money which S. then gave him, and wanted him to come that night to help kill C. Idem..... 357

21. Same—Appeal—Rejection of Evidence—Res Gestae—Declarations of a conspirator, made after the purpose of the conspiracy had been accomplished, not being admissible against his co-conspirators, unless competent as part of the res gestae, their rejection cannot be reviewed, it not clearly appearing how long after the commisison of the crime they were made. Idem..... 357

22. Homicide—Dying Declarations—Sense of Impending Death—Declarations of deceased made after he was shot, from the effects of which he died the next day, "they have killed me at last," and that the shots came from a certain place, are admissible as dying declarations, they sufficiently showing that he was impressed with the fact that he could not live. Idem..... 357

23. Res Gestae—Declarations—Testimony that witness heard the shots, saw C. during the shooting, that C. walked a few feet and fell, and witness immediately went to him, when he said they had killed him, and that the shots came from a certain place, show the declarations to be admissible as part of the

Digitized by Google

CRIMINAL LAW—Continued—
res gestae. Idem..... 357
24. Same—Declarations of Conspirators—Reference to Other Matters—Though on a prosecution for murder of C., killed pursuant to a conspiracy, witness testified to conversations had by him with defendant and other conspirators relating to the killing of M. and C., prior to the death of either, he may not testify to conversations had with them in which the killing of M. alone was discussed, especially where M. was not killed till a year after C. was killed. Idem..... 358
25. Same—Evidence—Inducements to Witness Not to Testify—Testimony, on the trial of H. for murder of C., of a witness who was a party to the conspiracy to murder and familiar with its details that after the murder, and before H. was indicted, he offered witness money to leave the country and never appear or testify against him or any of the conspirators is competent. Idem..... 358
26. Witnesses—Contradiction—The State may contradict the testimony of defendant in a murder case as to money which, it had been testified, he had given a witness to induce him to leave the country and not testify, the jury being admonished as to the purpose of the contradicting testimony. Idem..... 358
27 Stealing Chickens—Felony—Constitutionality—An act of the General Assembly approved March 17, 1904, entitled "An act to regulate crime and fix the punishment thereof" and providing: "If any person shall steal chickens, turkeys, ducks, or other fowls, of the value of $2, or more, he shall be confined in the penitentiary not less than one nor more than five years," is not in violation of section 51 of the Constitution providing that "No law enacted by the General Assembly shall relate to more than one subject and that shall be expressed in its title. Diamond v. Commonwealth... 418
28. Title to Act—Creating Crime—Prescribing Punishment—One Subject—It is not essential to the validity of an act creating a felony that the title should describe the conditions under which it shall become effective; nor is it obnoxious for an act to create the crime and prescribe the punishment, as the matter of the description of the crime and the fixing of the punishment are not two subjects. It is dealing with two features of the same subject, and both are germane to the title. Idem..... 418
29. Shooting at Random on Public Highway—What Constitutes Offense—Where persons engaged for pastime in shooting from the public highway with pistols at a mark on a hillside, outside of the highway, and not in range of persons near the

Digitized by Google

CRIMINAL LAW—Continued—

highway or traveling thereon, or in the direction of a dwelling house, they are not guilty of the offense of shooting at random upon the public highway, under Kentucky Statutes, section 1308. Callahan v. Commonwealth..... 445

30. Indictments—Description of Offense—Sufficiency—Where the words of a statute are descriptive of the offense, an indictment thereunder will be sufficient if it follow the language of the statute. International Harvester Co., &c., v. Commonwealth..... 543

31. Error in Name—Correction on Record—Under section 125, Criminal Code, providing that "an error in the name of the defendant shall not vitiate the indictment if the true name be discovered and an entry made on the record," an indictment returned against the "International Harvester Machine Co." when its true name was the "International Harvester Co., of America," which was corrected on the record by order of the trial court, the proceedings thereon were valid under the Code. Idem..... 543

32. Change of Venue—Duty of Court—Where, on an application of defendant for a change of venue, the petition and affidavits complied with the statute and established a prima facie case, it was the duty of the court, in the absence of other evidence, to grant the change. Shipp v. Commonwealth..... 643

33. Same—Local Prejudice—Prima Facie Case—Where, on an application by defendant for a change of venue for prejudice of the inhabitants of a county, the petition was in proper form, and it was supported by the affidavits of three citizens of the county, who stated that they were well acquainted with the public opinion, and that they verily believed the statements of the petition to be true, and were of the opinion that defendant could not get a fair trial within the county, such petition and affidavits established a prima facie case. Idem..... 643

34. Same—Evidence—Abuse of Discretion—In a prosecution for homicide, defendant applied for a change of venue, and established that decedent was extensively related within the county; that his relatives were influential and prominent citizens so numerous that there was not a precinct in the county where some of them did not reside; that they were extremely hostile to defendant, and since the homicide had been active in framing public sentiment against him, and had so diffused highly colored reports purporting to be the facts of the homicide that the better element of the jurors of the county had formed opinions as to defendant's guilt; and that he could not get a fair and impartial trial in the county. On

Digitized by Google

CRIMINAL LAW—Continued—
the hearing a dozen or more witnesses were introduced on each side and few, if any, of the State's witnesses claimed to know the sentiment in the county, merely stating their opinion that they believed that the people of the county would give any man a fair trial. Defendant's witnesses, however, swore that the feeling was strong against him; that lawyers had been advised not to engage in his defense, that several people had said he ought to be hung "crazy or not crazy;" and "that his relatives for 14 generations had died with their boots on." Held, that the denial of the application was an abuse of discretion. Idem..... 644

35. Same—Curing Error—Summoning Jury from Another County—After an application by defendant for a change of venue for local prejudice had been denied, the court attempted to get a jury within the county but failed. A jury was then ordered from another county, which, without the knowledge of either the trial court or defendant, was summoned by an important witness for the Commonwealth, and lodged at the house of Coffey, who, with her daughter, were also witnesses for the Commonwealth, the wife of the officer in charge of the jury being also cousin of both deecdent and his wife. Held, that the summoning of such jury did not cure the error in the court's refusal of the change of venue. Idem.... 644

36. Homicide—Motive—State of Mind—Evidence—Where, in a prosecution for homicide, defendant pleaded insanity, and claimed that his act was the result of an alleged criminal intimacy between his wife and decedent, evidence that shortly before the killing defendant's wife confessed to him, in the presence of his son, a criminal intimacy with decedent, was admissible to show motive and defendant's state of mind at time of the killing. Idem..... 644

37. Same—Declarations of Third Persons—In a prosecution for homicide, evidence that defendant's wife confesesd her intimacy with decedent to defendant's son before the homicide was inadmissible, in the absence of proof that such confession had been communicated to defendant prior to the killing. Idem..... 644

38. Same—Character of Third Person—Where, in a prosecution for homicide alleged to have been caused by decedent's criminal intimacy with defendant's wife, the wife was not a witness in the case and her reputation for chastity was not in issue, it was error to permit the Commonwealth to prove in rebuttal that the reputation of defendant's wife for virtue and chastity was above reproach. Idem..... 645

39. Same—Where, in a prosecution for homicide, it was claimed

Digitized by Google

CRIMINAL LAW—Continued—
that defendant shot decedent because of his criminal intimacy with defendant's wife, and it was proved that she confessed such intimacy to defendant shortly before the homicide, the Commonwealth could break the force of such alleged confession by proof that the wife was not at the place where the confession was stated to have been made, or that defendant and his son, who claimed to have heard it, were not there at such time, or by impeaching the reputation of defendant and the son for truth and veracity. Idem..... 645

40. Misconduct of Counsel—Prejudicial Error—In a prosecution for homicide alleged to have been occasioned by decedent's criminal intimacy with defendant's wife, after the court had erroneously allowed evidence of the wife's good character, counsel for the Commonwealth stated in his argument to the jury: "This great concourse of ladies and gentlement have assembled here, not as a compliment to the speaker, but to attest by their presence the high regard in which Mrs. Shipp (defendant's wife) is held, and her good character." Held, that such argument was prejudicial error, and was not cured by the admonition of the court that the jury should not consider such statement. Idem..... 645

41. Homicide—Voluntary Manslaughter—Instructions—In a prosecution for homicide, an instruction on voluntary manslaughter that if the jury believe beyond a reasonable doubt that defendant shot and killed decedent in sudden heat and passion, and without previous malice, the jury should find him guilty of manslaughter, etc., was objectionable for failure to require the jury to find that the killing was willful or unlawful. Idem..... 645

42. Same—Feloniousness—An instruction on voluntary manslaughter need not require that the killing be "feloniously done. Idem..... 645

43. Same—In a prosecution for homicide, an instruction on voluntary manslaughter should have charged that, if the jury believed from the evidence beyond a reasonable doubt that defendant did willfully and not in self-defense shoot and kill decedent, and that the shooting was done in a sudden affray, or sudden heat and passion, without previous malice, and under such provocation as was ordinarily calculated to excite passion beyond control, they should find him guilty of manslaughter, etc. Idem..... 645

44. —Trial—Misconduct of Counsel—Examination of Witnesses—In a prosecution for homicide, it was prejudicial error for the Commonwealth's attorney, in cross-examining witnesses for defendant, to persist in asking improper questions, to

Digitized by Google

CRIMINAL LAW—Continued—
which objections were sustained as to whether one of them had killed a man, whether another had ever had occasion to arrest defendant, take him home, or get him to leave town, whether a witness was present when defendant got into trouble with another, and whether still another witness was the same man who testified on the motion for a change of venue that 14 generations of defendant's family had "died with their boots on." Idem..... 646

45. Instructions—Principals and Accessories—Where accused was charged as principal and the court directed the jury to find him guilty as a principal or to acquit him, the court did not err in failing to give a peremptory instruction in his favor because the proof showed that, if guilty at all, it was as an accessory before the fact. Bast v. Commonwealth.... 747

46. Same—Insanity—Homicide—Where the plans laid by accused and another for the murder of deceased showed conclusively that he was not a man of insane mind, and that he fully realized that the act he was about to commit was wrong, the court properly refused to charge on insanity. Idem... 747

47. Homicide—Instructions—Defenses—Alibi—Insanity—Where, in a prosecution for homicide, defendant pleaded insanity and an alibi, and there was evidence justifying the jury in disbelieving the testimony with reference to alibi, an instruction that if the jury believed beyond a reasonable doubt that defendant unlawfully, feloniously, willfully and with malice aforethought, and not in his necessary or apparently necessary self-defense, shot deceased, from which shooting deceased then and there presently died, the jury should find defendant guilty of murder, etc., was proper. Idem..... 747

48 Accessories — Inducement — Where defendant was present, encouraging, assisting, and advising another in killing deceased, the law presumes that defendant's presence, etc., "induced" the commission of the act. Idem..... 747

49. Homicide—Self-Defense—Manslaughter—Where, in a prosecution for homicide, it appeared that defendant and another conspired to kill deceased, and that they approached him unawares and shot the top of his head off while he was lying asleep in his home, and that deceased's death was instantaneous, defendant was not entitled to an instruction on self-defense or on manslaughter, either voluntary or involuntary. Idem..... 747

DAMAGES—See Contracts, 2, 3.

DEEDS—See Advancements, 2; Descent and Distribution, 5—

1. Conveyance for Specific Purpose—Failure to Carry out the Trust—Liability of Purchaser—Under Kentucky Statutes, sec.

Digitized by Google

DEEDS—Continued—

4846, providing that "where lands are conveyed or devised to trustees or executors in trust to be sold generally, or for any specific purpose, the purchaser shall not be bound to look to the application of the purchose money, unless so expressly required by the conveyance or devise." Where a deed made to S. recited that "it is made with the understanding and agreement that S. has the right to sell the land, provided the money is reinvested in other lands, to be conveyed to S. during his life and after his death to his children," a purchaser of the land from S. was not bound to look to the application of the purchase money paid to S., and is not liable to the children of S., after his death, by reason of his failure to reinvest the money as directed in the deed. Stevens v. Smith, &c..... 780

2. Trusts—Resulting Trust—Payment of Consideration for Conveyance to Another—Where one who purchased at a commissioner's sale and who paid the consideration caused the conveyance to be made to another, the grantee held the land in trust for the purchaser. Noel v. Fitzpatrick..... 787

3. Husband and Wife—Disabilities of Coverture—Contracts—Under the statute of 1894 (Acts 1894, p. 176, c. 76), providing that a married woman may take, acquire, and hold property, and that she may in her own name, as if unmarried, sell and dispose of her personal property, a married woman who purchased land at a commissioner's sale was under no disability precluding her from assigning her bid and purchase to her husband. Idem 787

4. Witness—Competency—Transactions with Decedent—In a suit by the heirs of a married woman to set aside an assignment made by her to her husband of her purchase and bid at a commissioner's sale, the husband was incompetent to testify concerning any verbal transactions between himself and his deceased wife. Idem..... 787

5. Judicial Sales—Title and Rights of Purchasers—Assignment of Bid—Sufficiency—Civil Code. Prac., sec. 398, provides that a conveyance by a commissioner shall not pass any right until it has been examined and approved by the court, which approval shall be indorsed on the conveyance. A purchaser at a sale by a commissioner, after confirmation, filed in the court a writing requesting that conveyance be made to another. Held, that such transaction was sufficient to pass the purchaser's interest, as the title to property sold at decretal sale does not pass to the purchaser until it is conveyed under proper order of the court; the purchaser's

Digitized by Google

DEEDS—Continued—
interest in the meantime being merely an equitable one. Idem 787

DEFACTO OFFICER—See Municipalities 14, 15, 16.

DESCENT AND DISTRIBUTION—

1. Advancements—Sufficiency of Evidence—Evidence held to show that a conveyance made to a daughter and her husband was intended as an advancement to her and not in consideration of a purchase price mentioned in the deed. Crafton, &c. v. Inge, &c..... 89
2. Witnesses—Competency—Conversation had with Deceased Person—Under the express provisions of Civil Code Prac., sec. 606, limiting the competency of testimony concerning conversations and transactions had with persons since deceased, plaintiff could not show that, in a conversation had between him and decedent, services to be performed, etc., were agreed upon as the consideration for a conveyance of land made by decedent to himself, where no other person was present at the conversation and no one interested in the estate testified against plaintiff in reference thereto. Idem 89
3. Same—Persons Interested in Estate—Plaintiff claims that the consideration for land conveyed to them by decedent was the performance of services, etc. Decedent's widow testified that the conveyance was made as an advancement. Held that, since her property rights could not be affected by plaintiff's claim, her evidence was not embraced by Civ. Code Prac., sec. 606, permitting a person to testify as to transactions with a decedent when one interested in his estate shall have testified against such person with reference thereto. Idem 89
4. Same—Civ. Code Prac., sec. 606, permits a person to testify, as to transactions with a decedent when one interested in his estate shall have testified against such person with reference thereto. Held, that plaintiff could not make his testimony as to transaction with a decedent competent by eliciting as new matter, on cross-examination, testimony against himself as to the transaction from one interested in the estate. Idem..... 90
5. Deeds — Consideration — Conclusiveness of Recital — The recital of the consideration in a deed is not conclusive evidence of its truth, as it may be shown by verbal testi-

Digitized by Google

DEEDS—Continued—
mony or by circumstances that the recited consideration is not true. Idem..... 90

DOWER—

1. Demand for Assignment—Failure to Make—Under Ky. Stats., 1903, sec. 2132, which provides that after the death of either the husband or wife the survivor shall have an estate of which the other was seized during coverture, the right to have dower assigned ends at the death of the surviving husband or wife, and does not pass to the personal representative. Cain's Admr. v. Ky. and Ind. B. & R. R. Co. 449
2. Same—Rents and Profits—Under the direct provisions of Ky. Stats., 1903, sec. 2138, a surviving wife is entitled to one-third of the rents and profits of her husband's dowable real estate from his death until dower is assigned; and, the rental paid her being all that reasonably could have been demanded, her administrator cannot recover more. Idem..... 450
3. Covenants—Covenant Against Incumbrances—Construction—Creation of Trust—A deed from the heirs of a deceased owner of land contained a covenant warranting the title against all claims and incumbrances, except the dower of the widow of the deceased owner, "which claim for dower said second party (grantee) is to procure without cost to said first parties." Held, the language of the covenant did not create a trust in favor of the widow and a lien upon the lot as security for the value of the dower interest, the value of which it was alleged was retained by the grantee out of consideration for the premises. Idem..... 450
4. Same—A deed from the heirs of a deceased owner of land contained a covenant warranting the title against all claims and incumbrances, except the dower of the widow of the deceased owner, "which claim for dower said second party (grantee) is to procure without cost to said first parties." Held, that the language of the covenant did not impose upon the grantee any undertaking, to compel the widow to assert her claim of dower, or to take legal steps to divest her of it. Idem 450

DYING DECLARATIONS—See Criminal Law 22, 23.

Digitized by Google

EASEMENTS—

1. Alley—Plea—Res Judicata—Where,in an action by one claiming an easement in an alley way adjoining his land, the defendant pleaded a judgment in a former action between the parties in which the plaintiff in this action then claimed to be the owner of the alley, and denied that the defendant had any right or title thereto, and which judgment declared the defendant the owner of the alley and enjoining the plaintiff from using it, said judgment is resjudicata, and a bar to plaintiff's right of recovery. Sumrall v. Maninni... 66

ELECTIONS—

1. Ballots—Certificate of Officers—Ballots inclosed in sealed envelopes, marked "rejected," and returned by election officers, should not be counted, in the absence of a compliance with Ky. Stats., 1903, sec. 1482, requiring a certificate or statement signed by the election officers as to whether they had or had not been counted, and if counted, what part, and for whom. Duff v. Crawford..... 73
2. Same—Illegal Votes—Purging Ballot—The entire vote of a precinct wherein it was claimed illegal voting by illiterates took place should not be rejected, where the complaining candidate did not undertake to purge the ballot of these votes by showing for whom they voted, either by the election officers who saw the persons voting or by the illegal voters themselves, who could be compelled to testify for whom they voted. Idem..... 73
3. Same—Registration of Voters—Votes of Persons Not Registered—The casting and counting of a number of votes greater than the number of registered voters in a precinct embracing territory not within the limits of a town or city was not illegal, since the registration law applies only to voters residing in a city or town. Idem..... 73
4. Elections—Validity of Ballots—Signature of Clerk—Necessity—Under Ky. Stats., 1903, sec. 1471, providing that no ballot shall be rejected for any technical error which does not make it impossible to determine the voter's choice, the absence of the clerk's name on the backs of a ballot does not invalidate it. Orr, &c. v. Kevil, &c..... 720
5. Same — Contest — Fraud — Record — Evidence—Sufficiency—Under Ky. Stats., 1903, sec. 1596a, subsec. 12, providing that if it shall appear from an inspection of the whole record that there has been such fraud, intimidation, bribery, or violence in the conduct of the election that neither contestant nor contestee can be adjudged to have been fairly elected, the

Digitized by Google

ELECTIONS—Continued—
circuit court, subject to revision by appeal, or the court of appeals finally, may adjudge that there has been no election, etc., the record and evidence in an election contest examined, and held to show such fraud and bribery in the conduct of the election as to avoid the same. Idem..... 720
6. Same—Judges of Election—Cities of the Fourth Class—Council—Ky. Stats., 1903, sec. 3846, providing that the board of council of a city of the fourth class shall judge of the eligibility and election return of its members, etc., has no application to a case of an election of councilmen contested on the ground of fraud and bribery in the conduct thereof. Idem 720

ELECTRICITY—See Personal Injury 8, 9.

EMBLEMENTS—See Landlord and Tenant 8.

EMINENT DOMAIN—
1. Compensation—Additional Use of Property—Where a strip through a tract of land is condemned for railroad purposes, the railroad is not liable to the landowner for damages resulting from the laying of the additional tracks on the right of way not contemplated when the right of way was secured, in the absence of negligence in the operation of the road. L. & N. R. R. Co. vv. Scomp 330
2. Pleading—Conclusions—Ownership of Passway—An allegation in the petition that the plaintiffs owned a passway across defendant's railway track is not a mere conclusion of law. Idem 330
3. Same—Answer—Admissions—Failure to Deny—An allegation in the petition that plaintiffs owned a passway over a railroad track, not denied in the answer, must be taken as true Idem 330
4. Railroads—Operation—Obstructing Private Road—A railroad is liable to the owner of a passway over its tracks for its obstruction only where the obstruction is negligent, and not where it is required in carrying on the business in the usual and necessary way. Idem..... 331
5. Same—Measure of Damages—The measure of recovery for the obstruction of a passway over a railroad by the negligent operation of the road is not the decrease in the value of the property from the obstruction, but the decrease in the value of its use within five years before the filing of the action therefor. Idem 331

Digitized by Google

ESCHEAT—

1. Land Held by Corporation—Ky. Const. sec. 192, provides that a corporation shall not hold any real estate except such as may be necessary for carrying on its legitimate business, for a longer period than five years, under penalty of escheat. Ky. Stats., 1903, section 567, contains the same provisions. Ky. Stats., 1903, section 2971, being a part of the laws relating to the government of cities of the first-class, provides that so much real, personal, or mixed property in the city which, from alienage, defect of heirs, failure of kindred, or other causes, shall escheat to the commonwealth shall vest in the board for the benefit of the schools, and that the board may, in the name of the commonwealth, sue for and recover the same. Held, that the Legislature intended by the use of the words "other causes" in section 2971 to provide for the recovery of escheats by school boards happening upon events of a different class than those specially mentioned in the section, hence the board might sue to recover land escheated by a corporation under Const. Ky. section 192, and Ky. Stat. 1903, section 567. Comth. for Louisville School Board v. Chicago, St. L. & N. O. R. R. Co. 497
2. Same—Grounds—The state, in a just and proper exercise of its police power, may declare new causes of escheat of lands within its territory. Idem..... 497
3. Statutes—Constitutional Law—Special Legislation—Ky. Stats., 1903, sec. 2971, providing that the use of escheats in cities of the first class shall be for the public schools in such cities, and authorizing the school board to sue for the same, is not special legislation within the meaning of the constitutional inhibition, notwithstanding the state does not allow the same privilege to the school boards of other cities. Idem..... 498

ESTOPPEL—See Wills 1, 2.

EVIDENCE—See Criminal Law 12, 13, 14, 15, 16, 20, 21, 22, 23, 24, 25, 26, 36, 37, 38, 39—Descent and Distribution 2, 3, 4—Executors and Administrators 16—Life Insurance 7—Personal Injury 7.

1. Trial—Reception of Evidence—Civ. Code Prac. sec. 606, subsec. 3, provides that no person shall testify for himself in chief after introducing other testimony for himself in chief. Held, that where, in a suit to recover land, defendant claimed title under a title bond alleged to have been executed to I., and plaintiff took the deposition of I., in which he stated that

Digitized by Google

EVIDENCE—Continued—

no bond was made to him, and there was no cross-examination of the witness, and thereafter defendant took the deposition of I., in which he stated that a bond was executed to him, though defendant did not obtain leave to cross-examine I., the latter's second deposition should be regarded as a cross-examination, and hence an objection to a subsequent deposition given by defendant was without merit. Burkhart v. Loughridge 48

2. Best and Secondary Evidence—Lost Instrument—In a suit to recover land claimed by plaintiff under a title bond, the testimony of an attorney that plaintiff gave him the bond to keep and have it recorded, and that he did not know where it was, although he had made a thorough search for it, and that there was no intention on his part to misplace it, was sufficient evidence of the loss of the bond to admit parol evidence of its contents. Idem..... 48

3. Same—On an issue in an action to recover land as to the authenticity of a lost title bond, evidence considered, and held sufficient to sustain the same. Idem..... 48

EXECUTORS AND ADMINISTRATORS—See Banks and Banking 4—Insolvent Debtors 1.—

1. Appeal—Decision on Merits—Appeal from Decision on Demurrer—On appeal from a decision on a demurrer to a complaint in a suit to set aside a deed, where all the pleadings are before the court, the merits of the case should be passed upon. Jolly v. Miller.....100

2. Limitation of Actions—Accrual of Right of Action Against Trustee—Cancellation of Deed—Defendant was appointed administrator of the estate of his brother and was authorized by the heirs to compromise claims belonging to the estate and also given a power of attorney to sell and convey real estate. Subsequently on February 20, 1892, plaintiff, an heir, sold and conveyed to defendant his entire interest in the estate. January 1, 1902, defendant resigned as administrator, and April 26, 1904, plaintiff brought suit to set aside his conveyance for fraud and compel an accounting. At the time of bringing suit defendant's successor as administrator had not made a final settlement of his accounts. Held that, as plaintiff's conveyance on February 20, 1892, terminated the trust relationship between the parties, the statute of limitations limiting the time for the bringing of this action began to run on that date, and was not suspended until defendant or his successor had made a final settlement.

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued—
Idem 100
3. Same—Whenever a trustee, whether the trust be created by power of attorney or by appointment as guardian, executor, or administrator, repudiates the trust and asserts title to the subject of the trust, the statute of limitations begins to run when a knowledge of the repudiations is brought home to the cestui qui trust. Idem..... 101
4. Cancellation of Instruments—Additional Relief—Conveyance to Administrator—An heir, who has conveyed his interest in the estate to the administrator and subsequently sues to set aside the deed for fraud and asks for an accounting, cannot require an accounting until the conveyance is set aside. Idem 101
5. Limitation of Actions—Pleading in Avoidance of Defense—Where defendant, in addition to traversing the allegations of the petition, pleads the statute of limitations and plaintiff joins issue thereon, the traverse of the plea of limitations is bad and interposes no real defense to the plea. Idem.... 101
6. Same—Demurrer Raising Defense—Statute of limitations as a defense cannot be raised by demurrer. Idem..... 101
7. Appeal—Harmless Error—Sustaining Demurrer—Defendant pleaded statute of limitations, and, after plaintiff's demurrer had been overruled, he traversed the affirmative allegations of the answer and thereafter filed an amended petition to which defendant demurred on the ground of limitations. Pending the demurrer an answer was filed and demurrer thereto interposed, and, pending the demurrer, a reply was filed. Defendant withdrew his answer to the amended petition and renewed his demurrer to the amended petition, which demurrer was sustained. Held that, while the demurrer to the amended petition should have been sustained, the reply to the plea of limitations was bad, and the court on the pleadings as a whole should have rendered the judgment which it did. Idem..... 101
8. Venue—Actions Against Administrators—Statutes—The venue of an action by a creditor of a decedent, based on the ground that the administrator had wrongfully paid out the assets of the estate among other creditors is determined by Civil Code sections 65, 66, providing that actions to settle the estate of a decedent, etc., must be brought in the county in which the personal representative qualified, and not by section 78, providing that an action which is not regulated by the foregoing sections may be brought in any county in which defendant is

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued—
summoned, etc. Dinning v. Conn's Admx. 623
9. Dividend-Paying Securities—Sale—Ky. Stats., 1903, sec. 4707, declares that no administrator or executor shall sell any dividend-paying securities which the decedent owned at his death until so ordered by the court. Held, that such section applied only to stocks, that were actually paying dividends, and not to stocks which "may" at some time pay dividends Chappell, &c. v. Chappell, &c..... 691
10. Same—Ky. Stats., 1903, sec. 4707, prohibiting an executor or administrator from selling dividend-paying securities without an order of the court, by necessary implication authorizes an executor or administrator to sell non-dividend paying stock as personal property. Idem..... 692
11. Same—Sales—Vacation—Fraud—In a proceeding to set aside an administrator's sale of certain stock belonging to his intestate for fraud, it was necessary that the petition allege the facts constituting the fraud. Idem..... 692
12. Same—Evidence—In a suit to set aside an administrator's sale of certain stock for fraud, evidence held to sustain a finding that the sale was not fraudulent in fact. Idem..... 692
13. Claims Against Decedents—Verification — Sufficiency—An affidavit to a claim against a decedent, averring that there is "no legal offset or counterclaim" against the demand, is insufficient within Ky. Stats., 1903, section 3870, providing that demands against a decedent must be verified by an affidavit stating that there is no "offset or discount" against the same; the word "legal" rendering the affidavit only a statement of the belief of the affiant as to the legality of an offset, and the word "counterclaim" not being synonymous with the word "discount." Spradlin, &c., v. Stanley's Admr., &c. 701
14. Same—An affidavit in support of a claim against the estate of a decedent must comply with Ky. Stats., 1903, section 3870, requiring such claims to be verified by the claimant or his agent or personal representative, and, if the demand be other than an obligation signed by decedent or a judgment, the same shall be verified by a person other than the claimant, who shall state that he believes the claim to be just and give the reasons for his belief. Idem..... 701
15. Same — Limitations — Pleadings — Necessity—The objection that a claim against a decedent is barred by limitations, as a ground for refusing to order a sale of land to pay debts of a decedent, must be made in the circuit court by written exceptions, and, on such exceptions being filed, the claimant

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued—
must be allowed a reasonable time to take proof, if he so desires. Idem 702

16. Evidence—Bills and Notes—Pleading and Proof—In an action to vacate a judgment on the ground that it was based on a usurious note, certain notes, set out in the petition and filed as exhibits in the action, the first of them being identified by the note sued on, and it, in turn, identifying the other notes, were competent evidence, although they were not proven; there being no denial of them in the answer. Owsley &c. v. Boles Admr., &c..... 774

17. Claims Against Estate—Defenses—Usury—Under the express provisions of the statute in regard to the settlement of estates, a creditor of the estate of a decedent must purge his claim from all usury by his oath or affidavit before the claim will be allowed. Hence the administrator of the estate need not pay a judgment based on a usurious note and subsequently sue to recover back the money. Idem..... 774

18. Witnesses—Competency—Transactions with Deceased Persons—Under the express provisions of Civil Code Prac., sec. 606, subsec. 2, claimants against the estate of a decedent are not competent to testify with regard to verbal statements of, and transactions with, decedent. Idem..... 774

19. Limitation of Actions—Part Payment—Burden of Proof—When a credit on a note is denied by the payor, the burden rests on the holder to prove it. Idem..... 774

20. Administrators—Sale—Payment of Debts—Who May Purchase—Where the commissioner, under an order to an administrator to sell real estate to pay debt, becomes the purchaser at his own sale, directly or indirectly, there is no sale. Penn v. Rhoades, &c..... 798

21. Same—Who May Question Validity—Though the heirs resided in the vicinity of lands from the time of administrator's sale, and during subsequent transactions and sales thereof, they are not estopped from claiming the land on the ground of fraud in the administrator's sale, where they were in no position to know the title to the land and were not parties to any of the transactions. Idem..... 798

22. Quieting Title—Administrator's Sale—Estoppel of Heirs—Condition Precedent—Where the commissioner, under an order to sell real estate to pay debts of an estate, becomes the purchaser at his own sale, the heirs in an action to quiet title in them will be required to refund the commissioner's grantees his purchase money with interest, before being entitled to a decree. Idem..... 799

Digitized by Google

EXECUTORS AND ADMINISTRATORS—Continued—

23. Remainders—Actions Against Remainderman—Accrual of Right of Action—Possession of Real Property—The statute of limitations does not commence to run against a remainderman until his right of entry accrues by the termination of the life estate. Idem..... 799

EXPERT TESTIMONY—See Life Insurance 8.

FINAL ORDERS—See Judicial Sales 4, 5.

FISCAL COURTS—See Jailers 1, 2.

FRANCHISE TAX—See Municipalities.

GIFTS—

Inter Vivos—Delivery—Checks—The issual and delivery of a check for the purpose of a gift is not a delivery of the money, so that, the check not having been paid or accepted by the drawee, the gift is not completed, and therefore, the drawer cannot be considered as holding the money as trustee for the payee. Throgmorton v. Grigsby's Adm'r..... 512

HANDWRITING—See Landlord and Tenant 3.

HOMICIDE—See Criminal Law.

HUSBAND AND WIFE—See Deeds 3, 4—Life Insurance 7—Personal Injury 7—

1. Transactions Between Husband and Wife—Validity as to Third Persons—Ky. Stat. 1903, sec. 2128, provides that a transfer of personalty between husband and wife shall not be valid as to third persons, unless in writing and acknowledgement and recorded as a chattle mortgage, and that a wife may make contracts and sue and be sued as a single woman. A husband executed two notes, for the same amount, to a bank to secure a loan, pledging shares of stock belonging to him as collateral to secure the first note, and the wife pledged shares of stock belonging to her to secure the second. She paid off the first note with her own means, whereupon the bank released the husband's stock. The intention was to pay the note for which her stock was pledged, and on discovering the mistake the husband delivered to the wife his shares in pledge to secure the sum she had paid for him. Held, in a suit by a creditor of the

Digitized by Google

HUSBAND AND WIFE—Continued—
husband to discover assets, in which his stock was attached, that the agreement between the husband and wife that his stock should be held as security to indemnify her against loss not having been in writing or recorded was not enforceable as against the debt of plaintiff, but that the judgment should have subjected the husband's stock first to the payment of the amount paid for him by the wife, and that any surplus should then be applied to plaintiff's debts. Eberhardt, &c., v. Wahl's Adm'r..... 223
2. Same—Actions—Burden of Proof—Under the married woman's act, where a wife claims an interest in the husband's property by reason of a payment made by her on his behalf, the burden is not upon her to show affirmatively that the money was her separate estate. Idem..... 224

INCOME TAX—See Municipalities.

INDICTMENT—See Criminal Law—Intoxicating Liquors—
1. Indictment—Written in Pencil—The fact that an indictment was partly written in pencil will not vitiate it. Had it been wholly written in pencil it would have been legal. Jones v. Commonwealth..... 26
2. Former Jeopardy—New Trial—Defendant's Motion—A plea of former jeopardy can not be sustained where, after conviction, the verdict was set aside and a new trial granted on the defendant's motion. Idem..... 27
3. Rape—Age of Victim—Necessary Allegation—An indictment for rape need not charge that the female charged with being carnally known was above twelve years of age, as a failure to make such allegation in an indictment must be understood as meaning that the female was above that age. Idem.... 27

INFANTS—See Appeals, 8—Land, 1, 2, 3—
1. Judgments—Effect—Where an infant was sued for slander and was served with process, and no guardian or guardian ad litem was appointed for him, and no evidence was heard by the jury, a judgment rendered against him pro confesso was erroneous, but not void. Berryhill v. Holland..... 614
2. Same—Judgment—Vacation—Under Civil Code Prac., section 518, the trial court may vacate or modify a judgment against an infant after the expiration of the term, where the disability of the defendant did not appear in the record; there being no remedy by appeal. Idem..... 614
3. Same—Proceedings to Vacate—Failure to Verify Petition—Effect—The failure of plaintiff to verify his petition for the

Digitized by Google

INFANTS—Continued—
vacation of an erroneous judgment rendered against him while he was an infant, as required by Civil Code Prac., section 520, did not make the petition demurrable. Idem..... 615
4. Same — Sufficiency of Petition — Allegations of Defense — Though Civil Code Prac., section 520, requires a petition for the vacation of certain judgments to set forth the defense to the action, if the party applying is the defendant, a judgment awarded against an infant in a slander suit, without any defense by a guardian or guardian ad litem, and without any proof could not stand, though the infant in his petition for the vacation of a judgment did not set forth any defense to the action, since under the law all allegations against an infant must be proven, though not traversed. Idem..... 615

INSANITY—See Criminal Law, 46, 47.

INSOLVENT DEBTORS—
Settlement of Estates—Release by Creditor—Agreement with Debtor—Action to Enforce—A statute of Minnesota provides, in substance, that "no creditor of an insolvent debtor shall receive any of the proceeds of the debtor's estate unless he files with the clerk of the court a release to the debtor of all claims therein other than such as may be payable under the provisions of the act." It was agreed by an insolvent debtor in said state, that if a certain creditor would file his claim under said act and receive his pro rata share of the debtor's estate that he would thereafter pay the balance of his claim, with interest, as soon as he could. In an action in this State to enforce said agreement, held—that it was not founded upon sufficient consideration, was fraudulent and not enforcible. Westheimer & Co. v. Flarsheim & Co., &c..... 480

INTERSTATE COMMERCE—See Intoxicating Liquors.

INTOXICATING LIQUORS—
1. Commerce—Interstate Traffic—Sale of Intoxicating Liquors—Where a liquor dealer outside the State ships whisky C. O. D. into the State consigned to one who has not ordered it, and then notifies him thereof, whereupon he pays for and receives it, the transaction is not interstate commerce. Adams Express Company v. Commonwealth..... 160
2. Intoxicating Liquors—Violation of Prohibition Law—Express Companies—Where a liquor dealer outside the State ships whisky by an express company, C. O. D. consigned to one

Digitized by Google

INTOXICATING LIQUORS—Continued—
who has not ordered it, and then notifies him thereof, whereupon he pays the company therefor, and receives it, the company is guilty of violating the prohibition law, even if it believes the acts of the consignor are legitimate acts of interstate commerce. Idem..... 160
*3. Same—Evidence—Evidence on a prosecution of an express company for violation of the prohibition law held sufficient to show that it knew the nature of the transaction. Idem..... 160
4. Local Option—C. O. D. Shipments—Liability of Carrier—Defense—Interstate Commerce—An express company which knowingly carries a C. O. D. shipment of liquor from a foreign state into a local option territory to a consignee who informs it that he has not ordered the same but will accept it if it is held for him until he can procure the money to defray the charges, becomes, by holding the liquor a week pursuant to the arrangement with the consignee, a mere bailee or warehouseman of the liquor, and cannot defend a prosecution under Ky. Stats., 1903, section 2557, sub-section 4, declaring sales of liquor shipped C. O. D. into local option territory unlawful, and making the carrier selling or delivering the goods liable jointly with the vender, on the ground that the shipment is interstate commerce, but is guilty of a violation of the statute, as the actual seller of the liquor. Adams Express Company v. Commonwealth..... 182
5. Prosecution—Jurisdiction—Under Ky. Stats., 1903, section 1141, providing for a prosecution by information filed in a circuit court for a misdemeanor punishable by fine of not more than $100, and by imprisonment of not exceeding 50 days, the circuit court has jurisdiction by information of the offense of selling liquro on a general election day. Ford, &c., v. Moss, Judge..... 288
6. Indictment—Misdemeanor—Common-Law Offense—An indictment is not necessary in the prosecution of a misdemeanor. which was not an indictable offense at the common law, under Const., section 12, providing that no person, for an indictable offense, shall be proceeded against criminally by information, except in cases arising in the land or naval forces, or in the militia in time of war or public danger, or by leave of court for oppression, or misdemeanor in office. Idem..... 288
7. Regulations—Election Days—School Elections—Const., section 154, requires the Legislature to enact laws to prohibit and regulate the sale of liquor on election days. Ky. Stats., 1903, section 1575, makes it a misdemeanor to sell liquor "upon the day of any general or primary election." Held,

Digitized by Google

INTOXICATING LIQUORS—Continued—
that it is a misdemeanor to sell liquor on a day when a school election is being held throughout the State. Idem.. 288
8. Local Option Districts—Carrying Whisky Thereto for Hire—Indictment—Insufficient Allegations—Under an act to regulate the carrying, etc., of intoxicating liquors into local option districts (Acts of 1906, page 320), providing "that every firm, common carrier, corporation or individual who receives pay for conveying vinous, malt or spirituous liquors shall be deemed a violator of the provisions hereof," an indictment against an individual for carrying whisky into a local option district and delivering it to another, which failed to allege that he received pay therefor, is not good. Commonwealth v. Hardy..... 375

JAILERS—
1. Fiscal Courts—Jurisdiction—Contract with Jailer—The fiscal court is one of special and limited jurisdiction and it has no power to appropriate the money of the county, except as authorized by law. There is no statute authorizing the fiscal court to make any kind of a contract with the jailer. Mitchell v. Henry County..... 833
2. Fees of Jailer—Statute Fixing—Ex Officio Services—The statute fixes the fees of the jailer for all services rendered by him and when as in section 3948, the statute requires him to superintend the public square, courthouse, clerk's office, jail, stray pen, etc., such services must be regarded as ex officio, for which no charge can be made. Idem.... 833

JEOPARDY—See Indictment, 2.

JUDGMENTS—See Infants, 1, 2, 3, 4—
1. New Trials—Final Order—Appeals—A judgment awarding a new trial, granted after the term at which the original judgment was rendered, is a final order from which an appeal lies. Francis v. Lilly's Ex'r..... 230
2. Courts—Jurisdiction—Conferred by Law—Recital in Judgment—A court cannot make jurisdiction for itself; it must be conferred by law. The mere recital by the court in its judgment that it has got the party before it cannot make the fact so if it is not so, and such false recital cannot create a jurisdiction which the law has withheld. Idem... 230
3. Action to Set Aside Judgment—Truth May be Shown—Verity of Judgment—In a direct attack upon a judgment by suit filed to set it aside, the truth may be shown against either the sheriff's return of service or the recital of service in

Digitized by Google

JUDGMENTS—Continued—
the judgment. The verity ascribed to judgments of courts of general jurisdiction does not attach in a direct proceeding to vacate the judgment. Idem..... 231
4. Return of Officer—Absence of Summons—Presumptions—May be Rebutted—The presumption that the officer did what he certifies he did, and that in the absence of a summons from the record the court had something before it to warrant the judgment are presumptions of fact, which may be overcome by evidence. Idem..... 231
5. Void Judgment—Proceedings to Vacate—How Regulated—Proceedings to open up a void judgment because of fraud in the obtention, or because rendered without service of process or appearance, are not governed by the Code of Practice regulating the granting of new trials, but rest upon the common law and the statutes for relief from fraud or misadventure. Idem..... 231
6. Divorce—Alimony—Finality of Judgment—Action on Judgment—A decree awarding to a wife certain weekly allowances as "alimony pendente lite until final order" was not a final judgment, on which an action could be maintained. Geisler v. Geisler..... 292
7. Appeal—Presumptions—Regularity of Proceedings—Where, in an action to vacate a judgment, plaintiffs contended that in the original action an order of revivor after the death of the defendant therein was not made until more than a year after his death, and that no guardian ad litem was appointed for an infant defendant, held that, it appearing on appeal that the record in the original action was imperfect, and there being no affirmative showing to the contrary, it must be presumed that the order was made in proper time, and that all the heirs of the deceased defendant were of age when it was made. Estep, &c., v. Estep, &c..... 421
8. Judgment—Vacation—Limitations—One against whom a judgment has been procured by the fraud of the successful party may have it vacated on a proper showing, if the application is made within the 10 years allowed by Ky. Stats., 1903, section 2519. Idem..... 421
9. Same—Action—Petition—Sufficiency—In an action to set aside a judgment as obtained by fraud, mere allegations of the petition that the judgment was fraudulently and wrongfully procured, in that one of the attorneys for the unsuccessful party became interested for the other party and used his influence in procuring the judgment, was insufficient. Idem..... 421
10. Dormant Judgment—Revival—Death of Party—Statute of

Digitized by Google

JUDGMENTS—Continued—

Limitations—An execution issued on a judgment after one of the defendants in the judgment dies is void as to the one deceased, and cannot be enforced against his estate, unless its validity be restored by its revivor against his representatives; and hence it does not stop the running of the statute of limitations so far as his estate is concerned. People's Bank of Ky., &c., v. Barbour, &c..... 539

JUDICIAL SALES—See Deeds, 5—

1. Bona Fide Purchasers—Without Notice—A purchaser of land at decretal sale can not claim to be a bona fide purchaser without notice, when at the time of the sale an adverse claimant was present with a title bond in his hand forbidding a sale of a part of the tract, and the commissioner then announced that they were selling only the unsold land. Burkhart v. Loughridge..... 48
2. Vacating—Irregularities in Decree—Defendant's land was sold under a judgment obtained by plaintiffs, who became the purchasers, and a deed was made to them. Subsequently an order was made for the purpose of supplying an omission in the record in failing to have the report of sale of the commissioner confirmed, and this order confirmed the sale and directed the commissioner to prepare another deed. Later another order was made for the purpose of correcting an error in the description of the land in the second deed, and the commissioner was directed to prepare a deed with correct description. Both orders were made without notice to defendants. Held, the substantial rights of defendants were not prejudiced or affected by the orders made. Forrester, &c., v. Howard, &c..... 215
3. Same—Confirmation—Where the record does not show that the report of sale made by a commisisoner was confirmed, an order of the court directing that a deed be made is, in effect, a confirmation of the sale. Idem..... 215
4. Appeal—Decision Reviewable—Relating to Judicial Sale—An order confirming a sale of land and directing that a deed be made is a final and appealable order. Idem..... 215
5. Judgment—Vacation—Right of Relief—Where an order is final and appealable it can be vacated or modified by an appeal to this court, or by the lower court for any of the causes specified in Civil Code Prac., sec. 518, but in no other way. Idem..... 216
6. Exceptions to Report—Existence of Other Remedy—Where an order confirming a sale of land and directing that a deed be made was not appealed from nor vacated or modified

Digitized by Google

JUDICIAL SALES—Continued—
under Civil Code Prac., sec. 518, which provides the grounds on which a judgment, after expiration of the term, may be vacated or modified, an order sustaining exceptions to the report of sale was a nullity, since the court had lost control of the case. Idem..... 216
7. Same—Conveyance to Purchaser—Presumption—It will be presumed that the description in a deed made by a commissioner in pursuance of an order of the court, followed the description of the land contained in the pleadings and judgment under which the land was sold. Idem..... 216
8. Same—Correction of Errors—If, by a mistake, or neglect, the description of land in a deed made by a commissioner in pursuance of an order of the court does not conform to the description of the land contained in the judgment under which the land was sold, and report of sale, the court at any time can permit its commissioner to correct the deed or make a new deed conforming to the judgment and report. Idem.. 216
9. Appeal—Presentation of Error—Motion for New Trial—Necessity—Where the record discloses all the facts necessary to enable the court to consider the questions of law presented, a motion for a new trial is not necessary. Idem..... 216
10. Attorney and Client—Lien—Property in Litigation—An attorney who defends an action in which it is sought to recover property is not entitled to a lien upon the property he succeeds in saving for his fees. Idem..... 216
11. Judgment—Vacating—Waiver of Right—Although so much of a judgment is erroneous as awards an attorney a lien on land for his fees, the objection comes too late when first made on a motion to vacate an order confirming the sale under the judgemnt directing a deed to be made. Idem... 216

JURISDICTION—See Assignment, 1, 5—Judgments, 2, 3, 4.

LAND—
1. Infants—Sale by Father—Void Unless Ratified—A sale of the land of an infant by her father is not binding on the infant unless ratified by her after she becomes 21 years of age. Smith v. Commonwealth..... 63
2. Same—Purchaser of Infant's Land—Void Sale—Adverse Possession—Married Woman—Limitation—Where a father in 1869 sold the land of his infant daughter, who was born in 1857, and married in 1874, the sale being void, —the possession of the purchaser did not become adverse until she became of age in 1878, and she being then a married woman, the statute of limitation did not run against her. Idem..... 63

Digitized by Google

LAND—Continued—

3. Same—Champerty—One who is in possession of land as a purchaser from an infant does not hold adversely to the infant within the meaning of the champerty statute, and his possession does not render void a conveyance made by the infant to another after arriving at age. Idem..... 63
4. Public Lands—Release and Quitclaim—Operation and Effect—A release and quitclaim by a patentee of public lands to certain named grantees and all other holding older titles of all his interest acquired by a patent in 1853, in so far as it covers land patented, held, or claimed by the parties of the second part under title older than the patent, is of no avail to one who is not shown to have been in possession of any land covered by the patent and against whom is set up a patent issued in 1846 to the patentee who executed the release. Fox, &c., v. Commonwealth..... 139
5. Same—Patents—Validity—Description of Land—A patent of public lands, definite in its description of boundaries, is not void because it fails to refer to and exclude older patents included in it; those portions being excluded by operation of law. Idem..... 139
6. Quieting Title—Title to Sustain Action—Possession—Where a claim to have title quieted is asserted by a defendant as a counterclaim, and there has been an effort on the part of the person against whom the claim is asserted to deprive the defendants of his title by converting it to his own use, Ky. Stats., 1903, section 11, authorizing suit to quiet title by an owner in possession, does not apply, so as to require proof of possession by the defendant. Idem..... 140
7. Boundaries—Description—Water Courses—The mouth of the second right-hand fork of a stream called for in a survey is a natural, indestructable monument, which will prevail over courses and distances if any must yield. Morgan, &c., v. Renfro..... 314
8. Same—Stake as Corner—Presumption—Performance of Official Duty—County Surveyor—It will be presumed that the county surveyor when he designates a corner of a survey as being at a stake, actually placed one at the point indicated, in compliance with Rev. Stats., 1852, c. 102, section 3, sub-sec. 2, requiring the county surveyor in locating and surveying entries to bound them by plainly marked trees, stones, or stakes. Idem..... 315
9. Boundaries—Description—Survey—Courses and Distances—Where corners marking three successive lines of a survey are lost, the distances of the three lines will be altered proportionately to make them conform to the known parts of

Digitized by Google

LAND—Continued—
the boundary rather than to radically alter the course of one of the lines. Idem..... 315
10. Same—Point oi Known Survey—Where a survey calls for a point in the line of a known survey, a corner of which is the nearest point in the line to the last call of the survey in question, the corner should be accepted as the point intended. Idem..... 315

LANDLORD AND TENANT—See Personal Injury, 4, 5—
1. Termination—Tenancy from Month to Month—Where a lease is from month to month, either party may terminate it by giving one month's notice. Pulliam v. Sells, &c..... 310
2. Judgment—Matters Concluded—Where the landlord in a lease by the month gave a notice terminating it, but he was defeated in a subsequent forcible entry and detainer proceeding, and subsequently he gave another notice and brought new proceedings, a plea of former acquittal was untenable. Idem.. 310
3. Evidence—Comparison of Writings—Ky. Stats., 1903, section 1649, provides that, on a dispute as to the genuineness of a handwriting of a person, other handwritings of such person may be introduced for comparison provided that the genuineness of such writings shall be proved, etc. Held that, where a party admits the genuineness of his signature to a writing to be compared with the disputed signature, it is not necessary to observe the requirements of the proviso. Idem... 310
4. Enjoyment of Premises—Refusal of Lessor to Place Lessee in Possession—Measure of Damages—Where a lease of a farm is entered into and the lessor refuses to place and keep the lessee in possession according to its terms, the lessee's measure of damages is the difference between the price he agreed to pay and the actual rental value of the property, together with special damages on the facts authorizing them. Devers v. May, &c..... 387
5. Same—Where a lessor refuses to place and keep the lessee in possession according to the terms of the lease, the lessee may recover in one action the difference between the price he agreed to pay and the actual rental value of the property, and such special damages as he has sustained. Idem..... 387
6. Same—Where a lessor of a farm refuses to place and keep the lessee in possession, the lessee to recover general or spcial damages need not allege or prove any effort to rent other land or to engage in other occupations; the recovery not being for loss of time or services, but as damages for breach of a contract for the use of specific property. Idem..... 387

Digitized by Google

LANDLORD AND TENANT—Continued—

7. Same—Evidence—Admissibility—In an action by a lessee for the refusal of the lessor to place and keep him in possession of the premises, evidence that the premises for the term of the lease were worth a specified sum more for the uses for which the lessee had rented it than the agreed rent, was admissible on the issue of damages. Idem..... 387
8. Same—Crops—Rights of Tenant—Ky. Stats., 1903, sections 3862, 3863, provide that all the emblements of the lands of a person dying after the 1st day of March which shall be severed before the last day of December following shall be assets in the hands of his personal representative, and all the emblements growing on the lands the last day of December or at his death, if that shall happen after that date and before the 1st day of March, shall pass with the land to the heir or remainderman. An owner of a third person's life estate executed in September, 1903, a lease thereof to a lessee for a term of one year from March 1st following. In October, 1903, the third person died. Previous to his death the lessee had sown wheat on the premises. Held that, as the lessee occupied the same relation towards the premises as the life tenant did, he was not entitled to an interest in the wheat as emblements, because though the life tenant died after March 1st of that year, the wheat could not be severed from the land before the last day of December following. Idem..... 388
9. Collection of Rent—Notice to Vacate—Right to Eject Tenant—Waiver—The acceptance or enforced collection of rent in arrears at the time notice to vacate the premises is given, will not deprive the landlord of the right to eject the tenant. And without waiving his right he may also after forcible detainer proceedings have been instituted, collect or accept the rent that accrued between the date of the notice to vacate, and the issual of the writ, if under the statute, or contract, a certain number of days must elapse, after giving notice, before forcible detainer proceedings can be instituted. Rich v. Rose..... 669
10. Same—Forfeiture of Lease—Waiver—But if a landlord accepts or undertakes to collect rent not due, when notice to vavcate is given, and that does not accrue between the date of the notice and the issual of the writ, or rent that becomes due after forcible detainer proceedings have been instituted, he will waive his right to forfeit his lease under the notice as the acceptance of the rent or the attempt to collect it is a recognition of the right of the tenant to occupy the premises, and a waiver of the forfeiture. Idem..... 669

Digitized by Google

LANDLORD AND TENANT—Continued—

11. Fire on Leased Premises—Abatement of Rent—Ky. Stats., 1903, sec. 2297, provides that, unless a tenant otherwise contract, he shall not be liable for rent for the remainder of his term of any building leased by him and destroyed during the term by fire without his fault. Held, that where a group of buildings was leased, one of which was destroyed by fire during the term of the lease, without the fault of the tenant, he was entitled to abatement of the rent in the proportion that the rental of the building destroyed bore to the whole rent agreed to be paid. Scott Bros. v. Flood's Trustee.... 739

12. Same—A provision, in a lease of two buildings, that, if the leased premises are rendered untenantable by fire or unavoidable accident, the lessee may surrender the lease, does not provide for a partial destruction of the premises, not rendering them untenantable, but only less valuable, and does not render inapplicable Ky. Stats., 1903, sec. 2297, relieving a tenant from liability for rent for the remainder of his term, where any building leased by him is destroyed by fire without his fault. Idem..... 739

LICENSE TAX—See Municipalities.

LIENS—See Attorneys.

LIFE INSURANCE—

1. Life Policy—Lapse—Paid-up Insurance—After payment of twelve annual premiums there was a lapse of a life policy providing that if it lapsed after payment of two annual premiums the company would extend the full amount insured by the policy for such time as the full reserve would carry it, or would grant paid-up insurance, payable at death, for an equitable amount; and if such lapse was after payment of five annual premiums, the paid-up policy should be for as many twentieth-parts of the sum insured as there had been annual premiums paid. Before the lapse insured borrowed money of the insurer on his note, giving the policy as collateral security, the note providing that if it was not paid at maturity the insurer could ascertain the cash value of the policy, and cancel it, and with the cash surrender value pay the loan, and with the balance credit insured with as much paid-up insurance as such balance would purchase at the then age of insured. Held, that on settlement of the policy, which should be at the time of its lapse, insured had the right to a paid-up policy for twelve-twentieths of the original policy, and the insurer had no right to deduct from

Digitized by Google

Life Insurance.

LIFE INSURANCE—Continued—
the amount with which a paid-up policy should be bought, 25 per cent. of the reserve, and enough to continue the original policy till the note was due and interest thereafter to accrue, in addition to the principal of the note and the interest thereon to date. Penns Mut. Life Ins. Co. v. Barnett's Admr. 266
2. Paid-up Policy—Surrender Charge—Carroll's Ky. Stats., 1903, section 659, provides, in relation to life insurance, that in case of default of any premium on a life policy, after three years' premiums have been paid, the policy shall be binding on the company for the amount of paid-up insurance which according to the company's published tables of single premiums, the net value of the policy on such anniversary and the dividends thereon computed by the rule pointed out by the statute will purchase as a net single premium for insurance maturing and terminating at the time and in the manner provided in the original policy, provided that the reserve of such paid-up insurance shall not be less than two-thirds of the reserve of the original policy. Held, that the statutes do not warrant an insurer charging a surrender charge in issuing paid-up insurance on a defaulted policy; a contention that one-third of the reserve is not to be applied to the purchase of paid-up insurance being untenable. Idem 267
3. Usury—Notes—Where insured in a life policy borrowed money of the insurer on his note, giving the policy as collateral security, and the note provided that, if it was not paid at maturity, the insurer might ascertain the cash value of the policy and cancel it, and with the cash surrender value pay the loan, and with the balance credit insured with as much paid-up insurance as the balance would purchase, the note, in so far as it attempted to allow the insurer to charge a surrender charge in issuing the paid-up insurance, was usurious. Idem 267
4. Application—False Statements—Instructions to Jury—In an action on an insurance policy of one, who, on the trial is shown to have had tuberculosis prior to the issual of his policy, and who died thereof within a year thereafter, and who in his application stated that "neither he nor his parents, grand parents, uncles, aunts, brothers or sisters had ever had consumption in any form," it was error in the court to instruct the jury "to find for the plaintiff unless you believe from the evidence that the answers to the questions in the application, or some of them, were, without the knowl-

Digitized by Google

Life Insurance.

LIFE INSURANCE—Continued—
edge of the company, untrue in some particulars, in which true answers would have stated facts or conditions which were reasonably and ordinarily calculated to shorten life or increase the probability of death of the insured, or which if known to the defendant company, it, acting naturally and reasonably, would not have entered into the policy contract." Ill. Life Ins. Co. v. DeLang... 569
5. Same—The jury is not to judge whether if the truth had been stated, facts or conditions would have been disclosed, which were reasonably and ordinarily calculated to shorten life or increase the probability of the death of the insured, nor is it to determine whether if these matters had been disclosed the company, acting reasonably and naturally would have issued the policy. Idem..... 569
6. Same—The court should have set out in the instruction the questions and answers set out in the application and should then have told the jury that if these answers or any of them were substantially untrue, and if according to the usual course of the insurance business, the application would not have been accepted and the policy issued if the truth had been stated therein, they should find for the defendant, otherwise they should find for the plaintiff. Idem..... 570
7. Evidence—Wife of Insured—Competency—On the trial of an action against an insurance company on a policy issued to a father on the life of his son, the wife of the deceased son is a competent witness as to the health of her husband, or as to any matters not involving communications between her and her husband growing out of the marital relation. Idem.. 570
8. Expert Testimony—On the trial of an insurance case as to whether the insured had consumption, no witness, not an expert, should be allowed to state his opinion that the insured had or had not consumption, or that he was in good or bad health. Such non-expert witnesses may tell what symptoms they saw. and let the jury determine what these symptoms indicated. Idem 570
9. Life Policy—Conditions—Violation of Law—Self-Defense—Where insured shot and killed Spinks in self-defense, and was also shot and killed by Spinks, insured did not die in consequence of a violation or attempted violation of the laws of the State or of the United States, within a benefit certificate precluding a recovery under such circumstances. Woodmen of the World v. Walters..... 663
10. Appeal—Review—Verdict—Evidence—The Court of Appeals

Digitized by Google

Life Insurance.

LIFE INSURANCE—Continued—
will not interfere with the verdict of a properly instructed jury, unless it is flagrantly against the evidence. Idem...663
11. Mutual Companies — Assessments — Actions — Petition — A petition in an action by an insurance company organized under Ky. Stats., 1903, c. 32, subd. 5 (sections 702-722), to recover from a delinquent policy holder the amount of any assessment due, which does not aver the amount of the assessment, the necessity and purpose of it, and when and by whom it was made, is sufficient. Acton v. Farmers Home Ins. Co. 677
12. Same—Assessments—Notice—Tender of Policy for Cancellation—Ky. Stats., 1903, section 711, relating to insurance companies provides that the secretary shall, within 30 days after any assessment has been made, notify every member of the corporation by written notice, stating the amount due the corporation from the members, the time when, and to whom, it shall be paid, and the use to be made of the money collected. Held, that this does not require notice to a member who tenders his policy for cancellation. Idem..... 677
13. Life Policy—Payment of Premium—A life policy issued to insurer's soliciting agent stipulated that the insurer assumed no obligation until the first premium had been paid. The superintendent of the insurer paid the first premium and the agent was charged with it by having the same deducted from commission due him as soliciting agent. The insurer received the premium and accepted it. Held, that the first premium was paid, within the stipulation of the policy. Met. Life Ins. Co. v. Lindsay's Adm'r..... 707
14. Same—A life policy issued to insurer's soliciting agent stipulated that insurer assumed no obligation until the first premium had been paid. The superintendent of the insurer paid the first premium. The insurer accepted it. The insurer had a rule prohibiting the return of policies issued on the lives of superintendents and agents. Held, that the first premium was paid, rendering the policy enforceable. Idem 707
15. Authority of Agent—Scope of Employment—An insurance company is liable for the acts of its agent while acting in the apparent scope of his authority, and the knowledge of the agent is imputed to the company respecting any fact material to the risk, and the company is estopped from setting it up in defense unless the party dealing with the agent knew that the agent had limited power, and that he was exceeding the power conferred upon him by his principal.

Digitized by Google

LIFE INSURANCE—Continued.
Crawford's Admr. v. Travelers Ins. Co..... 733
16. Same—Age Limit—Knowledge of Agent—Ignorance of Purchaser—Question for Jury—Where an agent of a life insurance company sold a ticket to an applicant over sixty-five years of age for an accident policy on his life for twenty-four hours, and the purchaser was killed by accident within the twenty-four hours, the company is liable for the amount of the insurance named therein, provided the agent knew the purchaser was over sixty-five years of age, and that the purchaser did not know that the policy contained a clause making it void as to persons under eighteen years and over sixty-five years of age, which should have been submitted to the jury. Idem 734

LIMITATION—See Executors and Administrators, 2, 3, 4, 5, 6, 7, 15, 19, 23.—
1. Time—Consumption—Days Including First Day—Limitation of Actions—Under Ky. Stats., 1903, sec. 2516, providing that an action for personal injuries shall be commenced within one year after the accrual of the cause of action, an action commenced September 19, 1904, for injuries received September 19, 1903, was barred, since, in computing the time within which the action must be commenced, the day of the injury must be included. Geneva Cooperage Co., &c. v. Brown.. 16
2. Same—Sunday—Ky. St. 1903, sec. 454, providing that if any proceeding is directed by law to take place on a particular day of the month, if the day happen to be Sunday, the proceeding shall take place on the next day, does not extend to the provisions in the statute of limitations, and hence the expiration on Sunday of the year within which actions for personal injuries must be brought did not authorize the bringings of such action on the following day. Idem..... 17
3. Limitation of Actions—Parties—The institution of an action against a concern alleged to be a corporation, but which was in fact a partnership, was not the commencement of an action against the individual owners and operators of such cencern, so as to suspend the running of limitations as to them. Idem 17

LOCAL OPTION—See Intoxicating Liquors.

MANDAMUS—See Bridges, 3.

MARRIED WOMEN—See Lands, 2.

Digitized by Google

MASTER AND SERVANT—

1. Injury to Servant—Absence of Negligence—Risk of Servant—In an action by an employe of a railroad company, who was injured by a sliver from a piece of iron striking him in the eye, while assisting a boiler maker in chiseling a plug from the end of a flue therein, it being a part of his duty to assist in such work, the evidence showing that the work was being done in the usual way, and no evidence indicating that the boiler maker was guilty of any negligence in the performance of his work, the injury is one which was liable to happen to one engaged in such employment and for which there can be no recovery. I. C. R. R. Co. v. Young 8
2. Hazardous Business—Dangers Incident Thereto—Knowledge of Servant—Assumed Risk—In contracting to engage in a hazardous business the employe is presumed to have taken into consideration the hazard or risk to which he must expose himself in prosecuting the work, and an injury received in the line of his employment, which is not due to the use of defective tools or machinery, or the improper use of such tools by his superior, but which was the direct result of a danger incident to the nature of the business in which he was engaged, there can be no recovery therefor. Idem.... 8
3. Action for Personal Injury—Filing Amended Pleadings—Discretion of Trial Court—While the trial court has a large discretion in permitting amended pleadings to be filed, yet when during the progress of the trial it is developed by the evidence that an act of negligence not mentioned in the original pleading, caused or contributed to the injury complained of, the court should permit an amendment to be filed, on proper terms, especially when the amendment does not radically change the cause of action but merely adds an additional element to it. Ford v. Providence Coal Co. 517
4. Same—The only limitation upon the filing of amendments, is that they must be in furtherance of justice, and do not substantially change the claim or defense. Idem..... 517
5. Use of Defective Machinery—Expert Testimony—Competency—In an action by a servant against the master for damages caused by the alleged negligence of the master in furnishing the servant with a defective machine used in mining coal, it was competent for the plaintiff to introduce expert evidence showing that a fender or cover should have been placed so as to guard an exposed cutting chain by which he was injured, so as to make the machine reasonably safe; and that

Digitized by Google

MASTER AND SERVANT—Continued—
ordinarily these machines were supplied with such fender, and that there were holes in the machine in question for the purpose of attaching the fender. Idem..... 517
6. Safe Machinery—Duty of Master—The rule in this State, and the one generally prevailing, is that while the master is not required to furnish the servant with absolutely safe or faultless machinery, or to provide the most modern appliances, he is required to furnish safe places and reasonably safe appliances for the use of the servant. Idem..... 517
7. Exhibiting Injured Limb to Jury—Competent—In the trial of personal injury cases it is competent for the plaintiff to exhibit the injured member to the jury, and this he may do upon the request of his counsel or of the adverse party, provided the exhibition does not violate any rule of propriety or decency. Idem 517
8. Injury to Servant—Negligence—Customary Equipment of Appliances—A servant, injured by the starting of a dumb waiter while she was taking dishes from it, cannot recover of the master, on the ground that it was negligence not to have it equipped with a device preventing its being started while one was taking things from it, it never having been so equipped, and there being no evidence that they were usually or generally so equipped. New Galt House Co. v. Chapman 527

MECHANICS' LIENS
1. Statement of Claim—Description of Property—Sufficiency—A statement of a claim for a mechanic's lien described the property sought to be subjected as beginning at a point 647½ feet south of P. street, and extending southwardly from this point 26 feet and 4 inches. The property intended to be covered was in fact situated 637½ feet south of P. street and extended from this point southwardly 26 feet and 4 inches. The value of the 16 feet and 4 inches of the property intended to be covered, included in the description in the statement, was much greater than the claim. Held, that the inaccuracy in the description did not invalidate the lien under Ky. Stat., 1903, sec. 2468, requiring the filing of a statement of a claim for a mechanic's lien containing a description of the property intended to be covered sufficiently accurate to identify it. Mivelaz v. Johnson 251
2. Same—Name of Owner—A claimant for a mechanic's lien, who incorrectly states the name of the owner of the prop-

Digitized by Google

MECHANIC'S LIEN—Continued—
erty sought to be subjected, is not deprived of his right to enforce such lien under Ky. Stat., 1903, sec. 2468, requiring the statement filed thereunder by mechanic's lien claimant "to state the name of the owner, if known," since the claimant could not lose his rights by being mistaken in the name, as the statute only required it, if known. Idem 251

6. Same—Right of Subcontractor—Waiver of Right—Accepting Note from Main Contractor—The fact that a subcontractor accepted a note from the main contractor for the amount of his claim did not affect his right to enforce his mechanic's lien against property of the owner. Idem..... 251

MINES AND MINING—
Leases—Forfeiture—A coal, oil, gas and mineral lease provided that the lessor was to receive a pro rata share of all the oil and minerals produced and should gas be found, then a certain rental from each well, and the lease further provided that lessee should commence a well on the premises within a year or pay thereafter an annual rental of $16. A well was never commenced, but lessee paid the annual rent which was accepted by the lessor. Held that, notwithstanding the lessor was entitled to forfeit the lease for a failure to develop the premises, yet lessor could not do so until he had first declined to accept the rent and demanded of lessee a development of the premises. Monarch Oil, Gas and Coal Co. v. Richardson..... 602

MISCONDUCT OF COUNSEL—See Criminal Law, 5, 10, 11, 40, 44.

MUNICIPALITIES—
1. Taxation—Constitutional Provisions—Neither Const., section 181, relating to taxation, as amended, nor Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, requires any city or town to provide for taxation for municipal purposes on personal property, based on income, licenses, or franchises; but the municipal authorities are given the option to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, which option they may exercise, or not, in their discretion. Schuster & Co., &c. v. City of Louisville, &c..... 189

2. Same—The option given to municipal corporations by Const., section 181, relating to taxation, as amended, and by Act

Digitized by Google

MUNICIPALITIES—Continued—

March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, necessarily carries with it the power to define the classes of property as to which the substitution is made, since such substitution could not be made as to all classes of property. Idem 190

3. Taxation—Equality and Uniformity—Constitutional Provisions—Const., sec. 181, as amended, giving municipal corporations the option to substitute for the ad valorem tax on personal property a tax based on income, licenses, or franchises, does not repeal or impair the mandatory provision of section 171, declaring that all taxes shall be uniform on all property subject to taxation within the territorial limits of the authority levying the tax. Idem..... 190

4. Same—While the municipal legislature may, under the amendment of Const., section 171, classify personal property on the basis of income, licenses, or franchises, the tax must be uniform within the territorial limits of the authority levying the tax; and, under the guise of substituting one method of assessment for another, the burden, which should fall on all equally, must not be shifted, so as to throw on some more of the common burden than their proper share. Idem... 190

5. Same—Under Const., section 181, as amended, empowering the General Assembly to authorize cities to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses, or franchises, in lieu of an ad valorem tax thereon, and Act March 18, 1904, (Laws 1904, p. 93, c. 33), passed pursuant thereto, giving cities such authority, an ordinance providing a sliding scale as to merchants and manufacturers, under which the tax decreases with the amount of sales or manufactured product, is repugnant to Const., section 171, requiring taxes to be equal and uniform. Idem..... 190

6. Same—A city council may by ordinance provide for the taxation of personal property, based on income, licenses and franchises, provided the classes of property which are thus taxed are not favored and bear substantially the same part of the common burden as under the ad valorem system. Idem 190

7. Same—National Banks—Under the statute of the United States no tax can be levied on national banks, based on income, licenses, or franchises. Idem..... 190

8. Same—Discrimination between National Banks—Shares and

Digitized by Google

MUNICIPALITIES—Continued—

Other Moneyed Capital—Under Const., section 181, as amended, empowering the General Assembly to authorize cities to provide for taxation for municipal purposes on personal property, tangible and intangible, based on income, licenses, or franchises, in lieu of an ad valorem tax thereon, and Act March 18, 1904, (Laws 1904, p. 93, c 33), passed pursuant thereto, giving cities such authority, an ordinance providing for the levying of a tax on state and national banks and trust companies, based on income, licenses, or franchises, is void as to national banks; and if the shares of such banks should be assessed on an ad valorem basis, while the state banks are taxed under the ordinance, the assessment would be void as to national banks as a discrimination in favor of state banks and trust companies, the rate on the ad valorem basis being higher than that paid by the state banks and trust companies under the ordinance. Idem 191

9. Same—Income—License and Franchise Taxes—An ordinance purporting to make a permanent rate for manufacturers, merchants, banks, and trust companies, based on income, licenses, and franchises, which shall be unaffected by the fact that the rate on other property, on an ad valorem basis, may go up or down as the years go by, is void. Idem..... 191

10. Same—An ordinance fixing a tax, based on income, licenses, or franchises, is simply a substitute for ad valorem tax, and must in order to be valid, provide for an annual levy according to the ad valorem levy, and in such way as to produce practical equality between all classes of property, whenever a new ad valorem ordinance is passed. Idem..... 191

11. Taxation — Franchise Tax — Distribution of Proceeds — A city council may properly apportion a franchise tax between the different objects for which taxes are levied in the same proportion as the ad valorem tax is divided, and may set apart to the school fund such a per cent thereof as 33 per cent. of the ad valorem tax bears to the whole of it. Idem 191

12. Taxes—Time for Making Levy—Section 3644, Ky. Stats., 1903, governing fifth-class cities, provides that the council shall provide a system for the assessment, lecy, and collection of city taxes, which shall conform as nearly as the circumstances permit to the laws in reference to the assessment, levy, and collection of State and county taxes, "except as to times for such assessment, levy and collection." Section 3645 provides that the list as corrected by the board of equal-

Digitized by Google

MUNICIPALITIES—Continued—
ization "shall be the assessment roll for said tax for said year." Held, that a council of a city of the fifth class was authorized to make the levy for the collection of taxes for a year on the assessment made that year, and was not compelled to make the levy the year previous in accordance with the method used by counties. Blades v. City Falmouth...259
13. Same—Taxation System—Section 3644, Ky. Stats., 1903, governing fifth-class cities, provides that the council shall provide by ordinance a system for the assessment, levy, and collection of all city taxes, not inconsistent with the provisions of that chapter. Held, that a failure of a council to provide such a system would only invalidate acts in the assessment, levy, and collection of taxes, not authorized by the statute governing fifth-class cities. Idem..... 259
14. Same—Appointment of Assessor—Where an assessor is appointed by the council of a fifth-class city in 1904, it is not necessary to reappoint him in 1905 in order to make his assessment for that year valid, as section 3619, Ky. Stats., 1903, governing fifth-class cities provides for the appointment of an assessor for the term of two years. Idem..... 259
15. Same—Appointment of Clerk as Assessor—Section 3744, Ky. Stats., 1903, governing fifth-class cities, provides that the acceptance by one in office of another office incompatible with the one he holds shall vacate the first office. Section 3746 provides that no person shall at the same time fill two municipal offices. Held that, if the offices of clerk and assessor are incomptible, the appointment of the clerk to the office of assessor vacates the office of clerk, but does not invalidate the acts of the assessor. Idem..... 259
16. Same—Oath before Assessment—Defacto Officer—Where a city assessor omi's to take the statutory oath before making an assessment, his acts are those of a de facto officer and binding on the city and taxpayers, particularly where his assessment is revised and approved by the board of equalization, the members of which were sworn. Idem..... 260

NAME, ERROR IN—See Criminal Law 31.

NEW TRIALS—See Judgments 1—Judicial Sales 9.

NON-RESIDENTS—
What Constitutes—Action by—Bond for Costs—Under Civil Code, section 616, requiring non-residents before commencing an action in this State, "to execute a bond for all costs which

Digitized by Google

NON-RESIDENTS—Continued—
may accrue in the action," a temporary residence out of the State, even for an indefinite period, will not constitute the party a non-resident, if, at the time of departure from the State and during his absence therefrom, he has an intention of returning, and such intention may be shown by the declarations and acts of the party. Erwin v. Allen, &c. 458

PARENT AND CHILD—See Advancements 3—Land 1, 2, 3.

PARTY WALLS—See Contracts 3, 4, 5.

PENCIL WRITING—See Indictments 1.

PERSONAL INJURIES—
1. Streets—Use as Highway—Automobile Accident—Injuries to Pedestrian—Plaintiff was struck by defendant's automobile as plaintiff was following a street car which was about to stop on the opposite side of a street to permit him to board it. Defendant was driving his automobile at from eight to ten miles an hour on one of the principal thoroughfares of the city. He was unable to see the crossing as he approached it because the street car was between him and the crossing, and, instead of stopping his automobile until the car passed, he merely changed his direction, so as to go around the passing car, when he was brought face to face with plaintiff at a distance too short to prevent a collision. Held, that defendant was grossly negligent, rendering him liable for plaintiff's injuries. Gregory v. Slaughter..... 345
2. Damages—Verdict—Excessiveness—Plaintiff, who was struck by an automobile had his hand badly cut and one of his fingers broken, and was severely bruised. He was confined to his home for several weeks and his hand was permanently injured. Held that a verdict of $2,500 was not excessive. Idem..... 345
3. Damages—Loss of Time—In an action for personal injuries to an insurance solicitor, the fact that plaintiff's remuneration in his business was contingent, and depended on the number of risks he succeeded in writing during the year, did not preclude an allowance for loss of time because of his injuries to be determined on a basis of his average earnings. Idem 345
4. Municipal Corporations—Defects in Streets—Falling Objects—Plaintiff's intestate was killed by the falling of an iron

Digitized by Google

PERSONAL INJURIES—Continued—
water pipe constructed on the side of a building which abutted upon the sidewalk. There was no evidence tending to show notice on the part of the city of the defective and dangerous condition of the pipe. Held, that the city was not liable for damages by reason of the death of plaintiff's intestate. Mitchell v. Brady, &c..... 411

5. LandLord and Tenant—Condition of Premises—Injuries from Falling Objects—Where an iron water pipe constructed on the side of a building which abutted upon the sidewalk falls by reason of the fastenings of the pipe getting out of repair and pulling out of the wall, the tenant in possession is liable for the death of a person struck by the pipe while rightfully upon the walk. Idem 411

6. Same—Where an iron water pipe constructed on the side of a building which abutted upon the sidewalk falls by reason of the fastenings of the pipe getting out of repair and pulling out of the wall the owner of the building is liable for the death of a person struck by the pipe while rightfully on the walk, though the building is leased to another and the tenant had obligated himself to keep the property in repair. Idem 411

7. Witnesses—Competency—Testimony by Wife for Husband—Joint Interest—Ky. Civil Code, sec. 606, provides that neither husband or wife, while the marriage exists, shall testify against the other concerning any communication between them during the marriage, nor shall either of them testify for the other except in certain cases, and except in actions which might have been brought by or against the wife had she been unmarried. A husband, as administrator of the son, brought an action for damages for his wrongful death, the recovery in such a case, if there was one, belonging equally to the father and mother. Held, that the wife was a competent witness for plaintiff. Idem..... 412

8. Electricity—Contributory Negligence—Knowledge of Danger—Where deceased knew of and deliberately placed himself in position to receive an electric current, though its existence was due to defendant's negligence, there can be no recovery.

9. Same—Trial—Instructions—The uncontradicted testimony that deceased was told that a telephone wire crossed an electric light wire; that he saw sparks flying from the telephone box; that he touched the box at various times with his fingers, and with a wire, causing it to emit sparks; that he placed his hand upon the box and received the shock that

Digitized by Google

PERSONAL INJURIES—Continued—
killed him—is sufficient to require a peremptory instruction to the jury to find for defendant.

PHYSICIANS AND SURGEONS—
1. Physicians—Negligence—Damages—The measure of damages for injuries sustained by a patient as the result of unskillful or negligent treatment by a physician is a reasonable compensation for the bodily pain and mental suffering endured, and the permanent impairment of ability to earn money, which are the natural and proximate result of such treatment. Dorris v. Warford..... 768
2. Same—Degree of Care Required—The care and skill required by a physician in treating a patient is not "his best skill and ability," but he must use that care and skill which is exercised generally by physicians of ordinary care and skill in similar communities. Idem..... 768

PLEA IN BAR—See Appeals 6.

PLEADING—See Eminent Domain 2, 3—Infants 3, 4—Judgments 9—Master and Servant 3, 4—Railroads 4—Appeals 3.
1. Form of Allegation—Matters of Fact—Pleading Legal Effect—The allegation that plaintiff was "invited" to use the blacksmith shop of defendant is a conclusion of the plaintiff from what passed between himself and the defendant, with reference to his right to enter or use the shop. Brown v. Blackwell Coal & Mining Co..... 324
2. Same—Construction—In an action for personal injuries received in defendant's blacksmith shop, it was alleged that plaintiff was "invited" by defendant to use the shop at his pleasure. It was not alleged by what particular officer or agent of defendant the alleged invitation was given, and the petition was also silent as to the language employed at the time. It was not alleged that plaintiff accepted the invitation, nor that the shop was being used by defendant on the day of plaintiff's accident, nor that the plaintiff entered the shop by defendant's invitation on that day extended; the alleged invitation, according to the petition, having been given on a previous occasion. Held, that the meaning of the petition was that plaintiff had the permission or consent of defendant to use the shop; hence, what plaintiff designated as an "invitation" was but a license. Idem..... 325
3. Negligence—Dangerous Substances—Care Due to Licensees—Plaintiff was a licensee with a right to use a blacksmith shop

Digitized by Google

PLEADINGS—Continued—

maintained for defendant's private use. Plaintiff entered the shop for the purpose of doing some work, but it did not appear that defendant or its agents had any knowledge of this. During his work a spark from the anvil fell into a keg of blasting powder, and as a result of the explosion plaintiff was injured. The powder was uncovered, and it did not appear that its presence was unknown to plaintiff or could not by the exercise on his part of ordinary care have been discovered, nor that the shop had not previously been used to store powder. There was nothing to show that its presence therein at any time was a nuisance or dangerous to the public. Held, that defendant was not liable for injuries sustained by plaintiff. Idem..... 325

4. Same—Contributory Negligence—Licensee—A licensee of the right to use a blacksmith shop is bound to exercise ordinary care for his own safety. Idem..... 325

POOLS AND TRUSTS—

1. Combination—Fixing Prices—Evidence—On the trial of an indictment for a violation of Ky. Stats., section 3915, prohibiting a combination having for its object the fixing, regulating or controlling the price of merchandise, manufactured articles of property of any kind sold in this State, and fixing a punishment therefor, where the evidence shows that a general agent had charge of five competing harvesting machine companies for certain counties in Kentucky and Indiana, for which he was authorized to establish and did establish separate agents for the sale of each machine, at a fixed price, which was the same for each of them, at which price the local agents were each to account to the company for which he was selling, and neither was to sell outside of his territory on pain of forfeiture of his commission, Held —That this evidence was sufficient to authorize the jury to find the defendant guilty under the statutes. International Harvester Co., &c. v. Comth..... 544

2. Foreign Corporations—Jurisdiction—Beginning and Completion of Offense—While the Legislature of this State has no extra-territorial power to punish crime, if a foreign corporation doing business in this State enters into or becomes a member of a pool or trust, beyond the limits of this State, to fix the price of property in this State, then the crime, put in motion in the foreign state, becomes complete in this State, when committed here in pursuance to the conspiracy formed in a foreign state; and this applies to corporations

Digitized by Google

POOLS AND TRUSTS—Continued—
whether organized in or out of this State. Idem..... 544

PRESUMPTIONS—See Judgments 7—Judicial Sales 7.

PRINCIPAL AND AGENT—
Investing Money—When Agency Ceases—Liability of Principal—Bemiss, &c., executed bonds for land sold at decretal sale, which Potter signed as surety, on which the surety paid certain sums for which Bemiss, &c., executed their notes to Potter as agent, which he assigned to Mrs. Robertson who was a depositor in the bank of Potter, and who had authorized Potter to invest her money on deposit in good securities. Checks were drawn on Mrs. Robertson for the amount of the two notes and credited to the account of Potter, (who was the cashier of the bank) and who gave his individual check to the commissioner for the amount. Held, that Potter was the agent of Mrs. Robertson to invest her money, but his agency ceased when he took the notes of Bemiss, &c., and transferred the amount of them from her account to his. Bemiss, &c. v. Robertson, &c..... 397

PRINCIPAL AND SURETY—
Rights of Surety as to Co-Surety—One conveyed to appellant and appellee his equity of redemption in land sold under a mortgage, to indemnify them against loss as sureties on his bond as a guardian, and, becoming indebted to his ward, was sued and execution issued against the equity of redemption on a judgment against him for $331. Appellant purchased it at sheriff's sale for $175, which was applied to the ward's claim, appellant and appellee each paying $78 to discharge the balance. Appellant redeemed the property. Held, that the purchase by appellant did not redound to appellee's benefit, and no lien attached to the property in his favor for the amount paid by him towards the discharge of the guardian's debt. Elrod v. Gastineau..... 609

QUESTION FOR JURY—See Telegraphs, &c. 1—Street Railroads 5.

RAILROADS—
1. Killing Flagman at Street Crossing—Lookout Duty—Care Required—In an action against a railroad company to recover damages for the killing by one of its trains of a flagman, stationed at a street crossing in a city, to warn persons

Digitized by Google

RAILROADS—Continued—

attempting to cross the street, of the approach of trains, the court properly instructed the jury that it was the duty of the employees in charge of the train if they saw deceased in a place of peril from the approaching train, and apparently unconscious of his danger, to exercise ordinary care by the use of all means under their control to avoid injuring him, and that if they failed to do so, and by reason of such failure deceased was killed the law is for the plaintiff. Conniff v. L. H. & St. L. R. R. Co..... 763

2. Approaching Trains—Duty of Flagman—It is the duty of a flagman, who is stationed by a railroad company at a street crossing in a city, to warn persons of the approach of trains, to observe the approach of all trains and the company owes him no lookout duty whatever or to give him warning of the approach of its trains. Idem..... 763

3. Same—Additional Labor—Care of Switch Lights—In an action by the administrator of a deceased flagman of a railroad company for damages for being killed by a train at a street crossing, where he was employed to warn persons of approaching trains, the fact that it was a part of his employment to attend to the switch lights near the crossing, did not lessen his duty to keep a lookout for all approaching trains, and the employees of the company on the train owed him no duty, unless they saw him in a place of peril, apparently unconscious of his danger, and if so it was then their duty to exercise ordinary care to avoid injuring him. Idem 763

4. Damages—Personal Injury—Measure of Damages—Where, in an action for a personal injury, there was no allegation of loss of time or expense, the measure of damages was a reasonable compensation for the mental or physical suffering endured, and for the permanent impairment of power to earn money proximately resulting from the injury, and an instruction to find for plaintiff such an amount as would reasonably compensate her for any temporary or permanent injury sustained, and any suffering or pain endured, was erroneous. Cin. N. O. & T. P. R. R. Co. v. Giboney..... 806

5. Carriers—Personal Injuries—Condition of Premises—Negligence—A railroad must maintain its stations and platforms in a reasonably safe condition for passengers taking passage on its trains or coming to the stations for that purpose. Idem 806

6. Same—Persons to Whom Liable—A husband and wife, with their two children, went to a station to take a train. On

Digitized by Google

RAILROADS—Continued—

being unable to obtain a seat in the train, they alighted and placed one of their children on the train for the purpose of sending him home with relatives. The child began to scream on finding that his mother was not going to get on and she, on starting to take the child from the train through a window, stepped into a hole and was injured. The hole was in the pathway used by persons taking and leaving the train. Held, that the wife had not lost her right to be where she was at the time of the injury, and was entitled to recover, if she exercised ordinary care. Idem..... 806

7. Accidents at Crossings—Gates—Where a railway maintains a watchman and gates at a crossing and fails to keep the same down or give proper warning when trains are passing, it is liable to a person injured thereby who is not guilty of contributory negligence. L. & N. R. R. Co. v. Nelson.... 836

8. Same—Pleading and Proof—Variance—A party cannot recover for injuries alleged to have been received at a crossing if it is shown that he was not injured while passing over the crossing, but while alighting from a freight train. Idem 836

9. Same—Contributory Negligence—A party cannot recover for injuries received at a crossing if guilty of contributory negligence. Idem 836

10. Same—Failure to Look and Listen—Gates—Watchman—The failure to look and listen for a train at a street crossing is not per se negligence, where the railroad company keeps a watchman and gates at the crossing and the gates are up. Idem 836

11. Carriers—Personal Injuries—Persons Accompanying Passengers—Notice of Character—Where a plaintiff accompanying two small children purchased a half-fare ticket and the agent asked if it was for a particular child, the other being evidently too young to pay fare, and she answered that it was, that she was sending the children to their mother, these facts, with the further fact that no ticket was bought for herself, were not sufficient to charge the ticket agent with notice that she was going aboard only to assist the children. L. & N. R. R. Co. v. Wilson..... 846

12. Same—Where a train stopped its usual length of time at a station during which plaintiff, with baggage in her hand and without explaining her purpose, got on the train to assist her grandchildren who were with her and were to be passengers, there was no notice to the trainmen that she did not intend to remain on the train. Idem.....846

Digitized by Google

RAILROADS—Continued—
13. Same—Contributory Negligence—Where plaintiff boarded a train to assist a passenger, her jumping off after the train started was contributory negligence precluding recovery for injury. Idem 846

RAPE—See Criminal Law 3.

RES JUDICATA—See Easements.

ROADS AND PASSWAYS—See Eminent Domain 4, 5.

SALARIES—See Assignments 2, 3, 4, 5.

SCHOOLS AND SCHOOL DISTRICTS—
School Districts—Building House—Quarterly Court Judgment—Conclusiveness — Lien — Enforcement — Levying Tax — R. obtained a default judgment in the quarterly court against a school district for a balance due him for building a school house therein under a contract with the trustees on which execution was issued, and returned no property found. He then filed suit in the circuit court, setting up his judgment, execution and return, alleging a lien on the school house, therefor which he asked to be enforced, or for possession, of the house, to which the circuit court sustained a demurrer. Held—That the judgment of the quarterly court, not having been appealed from, is conclusive as to any matter of defense which was or which should properly have been pleaded thereto, and, although the plaintiff has no lien on the house or right to remove it, under his prayer for general relief, upon the facts stated, he is entitled to a judgment requiring the trustees to levy a tax to pay his claim. Raymer v. White School Dist. 96

SHOOTING AT RANDOM—See Criminal Law 29.

SPECIAL JUDGES—
1. Duties and Powers—It is not necessary that a special judge shall be a resident of the district in which he presides. Comth. v. Carnes 340
2. Qualifications—The present statute provides that a special judge must possess "all the qualifications of a circuit judge to try such action, proceeding or prosecution," but a statute requiring that a special judge must possess "the qualifica-

Digitized by Google

SPECIAL JUDGES—Continued—
tions of a circuit judge" means that he must possess all the qualifications of a circuit judge. Idem..... 340
3. Special Terms—A special judge may call and hold a special term just as a regular judge could hold it. Idem.....340
4. Granting Continuances—The special judge having the same power as the regular judge must necessarily exercise a sound discretion in the matter of granting continuances. It is proper that due regard should be given to the views of the attorney for the commonwealth, but the judge has a discretion which he must exercise. Idem..... 340
5. Indictments—Accessories Before the Fact—Under an indictment for murder one may be convicted as an accessory before the fact although not present at the time of the killing. Idem 340
6 Elisor—Appointment—Under the facts shown, the special judge did not abuse a sound discretion in deciding to appoint an elisor to act in lieu of the sheriff. Idem..... 340
7. Trying Cases as Docketed—The judge has the right to try the cases as they stand on the docket. Idem 340
8. Selecting Jury—Drawing from Wheel—Bystanders—In selecting a jury, if the special judge has not the key to the jury wheel he should apply to the regular judge for it, and when the regular panel of the jury is exhausted he should draw jurors from the wheel and not summon bystanders, and if, after a reasonable effort, a jury cannot be obtained in the county where the trial is had, he may direct a jury to be summoned from an adjoining county. Idem..... 340

SPECIAL LEGISLATION—See Escheats 3.

STEALING CHICKENS—See Criminal Law 27.

STREETS—See Personal Injury 4.

STATUTES CODE AND CONSTITUTION CITED AND CONSTRUED.

Kentucky Statutes:
Sec. 19—Conveyance 504
Section 32—Life Insurance 678
Section 75—Attorneys 125
Section 87—Assignments 124
Section 356—Jailers 834
Section 452—Time 21
Section 454—Time 24

Digitized by Google

Statutes, Code, &c.

STATUTES, &C.—Continued—
Section 465—Repeals 552
Section 474—Bills and Notes 211
Section 478—Bills and Notes 410
Section 483—Bills and Notes 408
Section 545—Private Corporation 631
Section 633—Life Insurance 279
Section 659—Life Insurance 276
Section 709—Fire Insurance 680
Section 712—Fire Insurance 679
Section 971—Special Judges 342
Section 1127—Crimes and Punishments 362
Section 1141—Crimes and Punishments 290
Section 1154—Crimes and Punishments 29
Section 1471—Elections 726
Section 1482—Elections 76
Section 1575—Elections 290
Section 1596a—Election Commr's. 728
Section 1606—Escheats 505
Section 1608—Escheats 505
Section 1611—Escheats 501
Section 1645—Evidence 314
Section 1749—Fees 834
Section 2128—Husband and Wife 226
Section 2132—Husband and Wife 453
Section 2132—Husband and Wife 306
Section 2138—Husband and Wife 453
Section 2297—Landlord and Tenant 743
Section 2245—Juries 344
Section 2358—Lands 593
Section 2506—Limitation 66
Section 2514—Limitation 541
Section 2519—Limitation 114
Section 2557—Local Option 184
Section 2971—Municipalities 500, 509
Section 2980—Municipalities 381
Section 3011—Municipalities 379, 382
Section 3012—Municipalities 381
Section 3619—Municipalities 65
Section 3629—Municipalities 262
Section 3637—Municipalities 600
Section 3643—Municipalities 596
Section 3645, 3654—Municipalities 263
Section 3744, 3746—Office and Officer 265
Section 3948—Jailer 834

Digitized by Google

STATUTES, CODE, &C.—Continued—
Section 4020—Revenue and Taxation 538
Section 4077, 4081—Revenue and Taxation 537
Section 4241—Revenue and Taxation 86, 87
Section 4643—Stenographers 60
Criminal Code—
Section 122— 363
Section 194— 344
Civil Code—
Section 19— 211
Section 36— 618
Section 44— 24
Section 66— 627
Section 78— 626
Section 126— 618
Section 278— 464, 467
Section 298— 430
Section 299— 431
Section 342— 23
Section 405— 542
Section 447— 465
Section 428— 625
Section 463— 674
Section 518— 221, 618
Section 520— 618
Section 606— 51
Section 616— 459
Section 648— 742
Section 745— 21
Section 747— 465
Section 760— 24
Section 764— 465
Constitution—
Section 12— 290
Section 42— 24
Section 51— 379
Section 154— 290
Section 171— 205
Section 181— 38
Section 256— 196

STREET RAILROADS—

1. Carriers—Injuries to Passenger Alighting from Car—When a street car has been stopped at the usual place for discharging

Digitized by Google

STREET RAILROADS—Continued—
passengers, it is the duty of the operative of an approaching car on a parallel track to have it under such control that it may be stopped at a moment's notice so that persons who have alighted may cross the tracks in safety. Louisville Ry. Co. v. Hudgins 78
2. Same—Contributory Negligence—Though one who alighted from a street car and walked around behind the same to cross a parallel track failed to exercise ordinary care to avoid a car approaching on the other track from behind the car from which she alighted, whereby she was injured, the company was liable, if the operatives of the approaching car could, by ordinary care, have discovered her peril and prevented injury to her. Idem 78
3. Injuries to Passenger—Negligence— Contributory Negligence —Evidence—Where plaintiff boarded a crowded street car, and stood on the steps of the platform thereof while the same was running rapidly and approaching a sharp curve, of whose existence plaintiff had knowledge, it was contributory negligence on his part to release, for the purpose of paying his fare, his hold on the handhold, precluding him from maintaining an action for injuries received through being thrown from the platform as the car rounded the curve. South Cov. & Cin. St. Ry. Co. v. Physioc..... 153
4. Negligent Killing—Speed of Car—Expert Evidence—On the trial of an action against a street railroad for damages for the alleged negligent killing of one on its track, it was not error in the court to refuse to permit the plaintiff to show by expert street car operators, what would be a safe and reasonable rate of speed for a car while being operated over a street at the point where the injury occured. Ford's Admr. v. Paducah City Ry. 488
5. Same—Question for Jury—On a trial for damages for the negligent killing by a street car of one on the track of the company, where it was proven the speed at which the car was running at the time, the condition of the street, the extent and purpose for which it was used by the public; with these facts before the jury it was for them to say whether the car was traveling at a dangerous rate of speed. Idem 488
6. Same—City Ordinance—Regulating Speed of Cars—Evidence —The violation of a city ordinance regulating the speed of street cars, is of itself no evidence of negligence on the part of the street car company, and such ordinance is not competent evidence of negligence. Idem 488

Digitized by Google

STREET RAILROADS—Continued—

7. Negligence of Motorman—Appearances—Killing Deaf Man—Reasonable Precuations—Where the motorman of a street car saw a man on the street, approaching the track some distance ahead, and at once sounded his gong and hallooed at the man, he was not required to stop his car, but had the right to assume that the man would not come upon the track until it became reasonably apparent to him that he was not going to get out of his way. After making this discovery it was then his duty to use all means in his power, to avoid injuring him. And the fact that the injured man was deaf, which was not known to the motorman, did not add to the motorman's responsibility. Idem 488

SUPERSEDEAS—See Appeals 4, 5.

TA ATION—See Counties—Municipalities.

1. Omitted Property—Special Proceeding—New Trial—Filing Appeal—The listing for taxation of omitted property is a special proceeding wholly regulated by sec. 4241, Ky. Stats., for which an appeal is provided from the decision of the county court to the circuit court, which under sec. 728 of the Civil Code must be filed in sixty days from the rendition of the judgment, and there being no power given the county judge after he has entered his judgment, to grant a new trial any orders which he may make in noting the filing of or overruling a motion for a new trial are void and do not stay the proceedings on the judgment, and the appeal is lost unless filed within sixty days from the rendition of the judgment. Comth. v. Adams Ex. Co..... 85
2. Statutes—Title—Subject of Act—Licenses—Acts 1904, p. 93, c. 33, entitled "An act to amend the revenue laws of cities of the first class so as to carry into effect the amendment of section 181 of the present Constitution," by section 2 repeals Ky. Stats., 1903, section 3011, providing for the licensing of trades, professions, and the keeping of vehicles and other property enumerated, in addition to taxation under the ad valorem system. Const., section 181 provides that the General Assembly may authorize cities to adopt a license system in lieu of ad valorem taxation in raising local revenue. Held, that Acts 1904, p. 95, c. 33, section 2, is not germane to the title of the act, and therefore is in conflict with Const. section 51, providing that no law shall relate to more than one subject and that shall be embraced in its title; but, as that section has no natural connection with the remainder

Digitized by Google

TAXATION—Continued—

of the act, the validity of the remainder is not affected. Wiemer v. Comr's Sinking Fund of Louisville..... 377

3. Same—The title to an act, in order to meet the constitutional requirement that an act shall not relate to more than one subject, which shall be embraced in the title, need not contain all the details of the body of the act; but the title should be so related to the body of the act as to naturally embrace it in the terms of the title. Idem..... 378

4. Corporations and Corporate Property—Corporate Franchise—Ky. Stats., 1903, sections 4077-4081, provides that certain corporations, including telephone companies, shall, in addition to other taxes, annually pay a tax on their franchises to the State and a local tax thereon to the county, incorporated city, town, and taxing district where the franchises may be exercised; and each corporation shall report the amount of tangible property in the State, and where situated and assessed, and the fair cash value thereof; and the board of valuation and assessment is to fix the value of the capital stock of each corporation, and from such amount deduct the assessed value of all tangible property assessed in the State—the remainder to be the value of its corporate franchise, subject to taxation in each county, incorporated city, town, or district through or into which the lines of the company pass. Section 4020 provides that all property of domestic corporations, including intangible property, considered in determining value of franchises, shall be subject to taxation, unless exempt by the Constitution, and shall be assessed at its fair cash value. Held, that the bonds, notes, accounts, cash, stock in other corporations, and other credits of a telephone corporation are intangible property, and not subject to assessment by the local assessor, but are to be considered by the board of valuation in fixing the franchise tax. Comth. By &c. v. Cumb. Tel. and Tel. Co..... 535

5. Omitted Property—Action in County Court—Appeal to Circuit Court—On an appeal from a judgment of a county court to the circuit court in a proceeding therein by a revenue agent against a defendant for a failure to list omitted property for taxation in which the county court adjudged that "the proceedings be dismissed," the circuit court should proceed to try the case anew, and upon the evidence determine whether or not the property is liable to assessmnt, and if the court concludes it is liable, it should remand the case to the county court with directions to enter judgment assessing the omitted property which the circuit court may adjudge to

Digitized by Google

TAXATION—Continued—
be liable and for what years, leaving to the county court the fixing of the fair cash value thereof. Comth, &c. v. Mitchell Cassell & Baker 581

TELEGRAPHS AND TELEPHONES—
Telephone—Damage by Lightning—Question for Jury—A patron of a telephone company notified the company to remove the box and wires from his house. The company removed the box, but left the wires so exposed that they were struck by lightning, damaging the house. In an action by the owner of the house for damages, Held, That it was a question for the jury whether the company had used such care as might be reasonably expected of a person of ordinary prudence in failing to remove the wires, and whether the plaintiff, by his want of care, contributed to the loss by suffering the wires to remain in the house, when by ordinary care he should have known of the danger. Evans v. Eastern Ky. Tel. & Telg. Co. 620
2. Failure to Deliver Telegram—Damages—Mental Suffering—Where a telegram showed on its face that it must be delivered on the evening on which it was sent to apprise the addressee of the coming of his daughter on a train at midnight, and that the addressee's residence was about three miles from the station, the telegraph company on failure to deliver, was liable for mental anguish suffered by the addressee's daughter, resulting from her being compelled to remain in the station until the street cars commnced to run in the morning. Postal Telegraph Cable Co. v. Terrell 822

TIME COMPUTATION OF—See Limitation 1, 2.

TITLE TO ACTS—See Criminal Law 28.

TRADE MARK—
1. Assignment—Infringement—Fraudulent Use—Remedy—Complaint—Election Between Counts—In an action for infringement of a trade-mark in the sale of whisky, it was proper to require plaintiff to elect between his cause for injunction and accounting, and his cause for damages based on fraud. E. H. Taylor Jr. & Sons Co. v. Taylor..... 173
2. Where plaintiff corporation purchased a distillery from the assignee of an insolvent partnership, and continued to use the brand and trade-mark of such firm without objections

Digitized by Google

TRADE MARK—Continued—

by the assignee or creditors of the firm, it must be presumed, in an action against a third person for the infringement of the trade-mark, that the debts of the partners were settled, and that the trade-mark reverted to the partners as their property, and that they had the right to use it in the name of the corporation which they subsequently formed. Idem 173

3. The application for registry of plaintiff's trade-mark stated that it "consists of the arbitrary word symbol 'E. H. Taylor, Jr., & Sons,' being a script fac smile of the signature of our name by the senior member thereof. This has generally been arranged x x x in black script, on a horizontal line within a circular border embracing the words 'Old Taylor,' but these are nonessential," etc. Held, that a trade-mark used by the defendant, having in it the words "Old Kentucky Taylor," is not an infringement of the plaintiff's trade-mark. Idem 173

4. In connection with this trade-mark in the sale of straight whisky plaintiff used the words "Old Taylor," though the essential feature of the registered trade-mark was the script fac simile signature "E. H. Taylor, Jr., & Sons," Defendant, in advertising his blended whisky, used the words "Kentucky Taylor" and "Old Kentucky Taylor." Held that, though there is not such an infringement of a trade-mark as entitles plaintiff to an injunction and an accounting, defendant is guilty of a fraudulent simulation of plaintiff's whisky, and plaintiff is entitled to an action for damages for the fraud. Idem 173

TRUSTS—See Deeds 2—Dower 3, 4—Executors and Administrators 3, 4.

TURNPIKES—

1. Municipal Corporations—Maintenance of Street—Highway Bought by County—Where a county buys all the turnpikes in the county, under the free turnpike act (Ky. Stats., 1903, section 4748b), the part of one lying within a city must be maintained by it, as a public way thereof, though it has not exercised control over it. Nelson County v. City of Bardstown 636

2. Bridges—Maintenance—Liability of County and City—Where a part of a turnpike within a county, bought by it under the free turnpike act (Ky. Stats., 1903, section 4748b), is a bridge, over a creek, the thread of which is the dividing line between

Digitized by Google

TURNPIKES—Continued—
a city within the county and the rest of the county, the entire expense of maintaining the bridge, which is entirely outside the settled part of the city, and is unnecssary for city purposes, and is essentially a county bridge, being required only for the travel to and from the county, is on the county. Idem 636

USURY—See Executors and Administrators 16, 17.

VENDOR AND PURCHASER—See Judicial Sales 1.
1. Lien of Vendor—Enforcement—Receiver—Evidence—In a suit by a vendor for the appointment of a receiver of property on which she has a lien, evidence considered, and held insufficient to warrant granting the relief sought. Murray v. Murray, &c. 425
2. Same—Insufficiency of Property—Civil Code Prac., sec. 298, provides that, on motion of any party to an action who shows that he has a lien on any property, the right to which is involved in the action, and that, the property is in danger of being lost, removed, or materially injured, the court may appoint a receiver to take charge of the property. Section 299 provides for the appointment of a receiver of mortgaged property at the instance of the mortgagee for the same reasons, and, in addition, if the property is probably insufficient to discharge the mortgage debt. Held, that a receiver will not be appointed at the instance of the vendor, who has a lien for the purchase price, where the property is in no danger of being materially injured, though it may not be sufficient to satisfy the debt. Idem..... 425
3. Same—Rents and Profits—The rents and profits of property cannot be set apart for the benefit of the vendor, unless done under authority of Civil Code Prac., sec. 298, providing for the appointment of a receiver if the property is in danger of being lost, removed, or injured. Idem..... 425

VENUE—See Executors and Administrators 8.

VERDICT—See Attachments 1.

VERIFICATION—See Executors and Administrators 13, 14—Infants 3, 4—Appeals 7.

WAIVER—See Appeals 8—Landlord and Tenant 9, 10.

Digitized by Google

Wills.

WILLS—

1. Election to Take under Will—Estoppel—Where one who has taken out a policy on her brother's life, payable to her if she survives him, otherwise to his executor or administrator, bequeathes it to one having an insurable interest in his life, and also devises real estate to such brother for life, and on the death of testatrix he takes possession of the real estate and received the rent thereof till his death, his election to accept the devise estops his administrator to claim the proceeds of the policy. Morath's Exr. v. Weber's Admr., &c. 128
2. Same—Condition of Bequest—Though testatrix bequeathed a policy on the life of her brother to his daughter, on condition that she pay the expenses of his last illness and of his burial, and he was killed in an accident, and was in his coffin when she learned of his death, and the cost of the funeral was paid by the executor of testatrix without notice to the daughter or opportunity to pay or request to do so, she is entitled to the legacy, less the cost of the funeral; there having been no expenses of illness, and no time for paying the expense of the funeral being fixed by the will, so that she is entitled to a reasonable time therefor. Idem..... 128
3. Same—Charges on Legacy—Under a will bequeathing a policy on the life of testatrix's brother to his daughter, on condition that she pay the expenses of his last illness and of his burial, and directing that the premiums on the policy be paid by her executor out of her estate, the legacy is not charged with the reimbursement of the estate for premiums paid. Idem 128
4. Rights of Devisees—Election by Husband—Ky. Stats., 1903, section 1404, providing the manner in which a widow may renounce her husband's will, does not apply to renunciation by the surviving husband of the will of his wife, but he may renounce under section 2067 providing for disclaimer by a devisee. Bottom v. Fultz 302
5. Same—Failure to Elect—Right to Compel Election—Under Ky. Stats., 1903, section 2067, authorizing a devisee to disclaim by deed within a year after notice of probate, a husband, if he wishes to renounce the will of his wife, must follow the provisions of the statute, and his failure to do so within the time prescribed amounts to an election to take under the will, but a court cannot require him to elect. Idem 302
6. Same—Construction—Husband's Life Interest—Forfeiture—

Digitized by Google

Wills.

WILLS—Continued—

Divesting Vested Interests—A wife bequeathed all of her property to her husband in trust for her children, with full power to sell, convey, and invest as he thought best, and use the income for his support during life, provided that the property should not be incumbered by, or its rents and profits in any way subjected to, the debts of the husband, and that if any court should hold that the profits may be subjected to the debts of the husband, his interest should instantly cease, and thereafter the rents and profits should be paid to her children. Held, that the provision as to the passing of the rents and profits to the children was valid. Idem.... 302

7. Construction—Disposition of Entire Estate—Where a will is susceptible of two constructions the law will place on it that construction which disposes of the entire estate of the testator. Howard v. Cole, &c..... 812

8. Same—Giving Effect to Whole Will—To arrive at the intention of a testator his entire will must be taken into consideration, and each clause thereof must be read in connection with the others. Idem 812

9. Same—Estates Acquired—Life Estate—A testator directed that his personalty should be sold to pay debts, declared that if the same was insufficient therefor the executrix should sell described real estate, and gave to his wife "during her natural life" all his real and personal estate "to own and do with as she pleases," and appointed her executrix. Held that, reading the quoted phrases together in connection with the direction of the executrix to sell certain real estate, the wife acquired only a life estate, with the remainder undisposed of. Idem 812

WITNESS—See Criminal Law.

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google

Digitized by Google